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APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 476

SEARS, ROEBUCK & CO.,

Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI FILED AUGUST 15, 1969
CERTIORARI GRANTED NOVEMBER 17, 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

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SEARS, ROEBUCK & CO.,

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APPENDIX.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

RELEVANT DOCKET ENTRIES.

August 29, 1968—Regional Director's Petition for Injunctive Relief Under Section 10(l) of the National Labor Relations Act, filed. (*No. C-1052*)

September 10, 1968—Hearing on Regional Director's Petition conducted before Judge Doyle.

September 27, 1968—Further hearing before Judge Doyle; dismissal by Judge Doyle of Regional Director's Petition.

October 2, 1968—Judgement of dismissal executed by Judge Doyle.

November 29, 1968—Notice of Appeal filed by Sears, Roebuck and Co., charging party before the National Labor Relations Board.

January 7, 1969—Record in C-1052 transferred to the Tenth Circuit Court of Appeals.

August 6, 1969—Issuance of Mandate of the Court of Appeals dismissing the appeal.

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

January 8, 1969—Appeal of Sears, Roebuck and Co. docketed.

January 8, 1969—Appellants' Docketing Statement filed.

January 17, 1969—Motion to Dismiss (or in the alternative to Affirm) filed by Appellee-Union.

February 3, 1969—Motion of Petitioner (Regional Director) to Dismiss Appeal For Lack of Standing, filed.

February 18, 1969—Response of Appellant Sears, Roebuck and Co. To Motions of Appellee And Petitioner To Dismiss Its Appeal, filed.

March 18, 1969—Oral Argument conducted in the Court of Appeals.

May 15, 1969—Opinion and Judgment of the Court of Appeals issued, dismissing the Appeal for lack of standing.

August 15, 1969—Notice received of filing by Sears, Roebuck and Co. of a petition for writ of certiorari.

November 17, 1969—Notice received that the petition for writ of certiorari was granted.

UNITED STATES DISTRICT COURT

For the District of Colorado.

(Filed United States District Court, Denver, Colorado, Aug. 29, 1968. G. Walter Bowman, Clerk.)

CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

Respondent.

Civil No. C-1052.

PETITION FOR INJUNCTION UNDER SECTION 10(l) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

To: *The Honorable, the Judges of the United States District Court for the District of Colorado:*

COMES NOW Clyde F. Waers, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(l) of the National Labor Relations Act, as amended, 61 Stat. 149; 73 Stat. 544; 29 U. S. C. Sec. 106(l) (herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before

the Board on charges alleging, *inter alia*, that Respondent has engaged in, and is engaging in acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Twenty-Seventh Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(l) of the Act.

3. On or about August 9, 1968, Sears, Roebuck and Co. (herein called Sears), pursuant to the provisions of the Act, filed a charge with the Board alleging, *inter alia*, that Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO (herein called Respondent), a labor organization, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. Copies of said charge are attached hereto as Exhibit 1 and made a part hereof.

4. The aforesaid charge was referred to Petitioner as Regional Director of the Twenty-Seventh Region of the Board.

5. Upon the basis of the following, the Petitioner has reasonable cause to believe that the charge filed on August 9, 1968, alleging the Respondent violated Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, is true and that a complaint of the Board, based on said charge under Section 8(b)(4)(i) and (ii), subparagraph (B) of the Act should issue against Respondent pursuant to Section 10(b) of the Act. More particularly, the Petitioner has reasonable cause to believe, and believes, that Respondent is a labor organization within the meaning of Section 2(5), 8(b), and 10(l) of the Act, and has engaged in and is engaging in acts and

conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, affecting commerce within the meaning of Sections 2(2) (6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal office at 1125—15th Street, Denver, Colorado, and at all times material herein, Respondent has been engaged within this judicial district in transacting business and in promoting and protecting the interests of the employee members of the Respondent.

(c) Sears, a New York corporation, is engaged at Denver, Colorado, as a retail department store. In the course and conduct of its business, Sears distributes and sells annually within the State of Colorado goods and other merchandise, having a gross value in excess of $500,000, of which more than $50,000 is transported directly to the State of Colorado from points outside that State.

(d) At all times material herein, Sears has maintained a retail department store at 2575 East 1st Avenue, Denver, Colorado, and has maintained a warehouse at 1701 West 6th Avenue, Denver, Colorado.

(e) Sears is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

(f) Joe and Eddie's Carpet Service (herein called Joe and Eddie's), is a partnership engaged in the business of carpet installing in Denver, Colorado. In the course and conduct of its business, Joe and Eddie's regularly provide services to Sears, among others.

(g) Daryl Massey, an individual, d b a Duke's Floor Covering (herein called Duke's), is engaged in the business

of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Duke's regularly provides services to Sears, among others.

(h) Joseph Mozzicato (herein called Mozzicato), an individual, is engaged in the business of installing floor coverings in Lakewood, Colorado. In the course and conduct of his business, Mozzicato regularly provides services to Sears, among others.

(i) Francis H. Harris, an individual, d b a Frank Harris Tile Company (herein called Harris), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Harris regularly provides services to Sears, among others.

(j) John Erpelding, an individual, d b a Sea-Ro Tile (herein called Sea-Ro), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Sea-Ro regularly provides services to Sears, among others.

(k) Gerald Fallert, an individual, d b a G & H Tile (herein called G & H), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, G & H regularly provides services to Sears, among others.

(l) Paul E. Clark, an individual, d b a Clark Carpet Service (herein called Clark), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Clark regularly provides services to Sears, among others.

(m) Elmer Neff, Jr., an individual, d b a E & R Carpets (herein called E & R), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, E & R regularly provides services to Sears, among others.

(n) Since on or about July 15, 1968, Respondent has demanded that Joe and Eddie's recognize and bargain with

it as the representative of the employees of Joe and Eddie's.

(o) At no time material herein has Respondent had any labor dispute with Sears.

(p) In furtherance of its demand referred to above in subparagraph (n), and for reasons unrelated to its relationship with Sears, on August 8, 1968, and since that date, Respondent did authorize, establish and maintain pickets at the premises of Sears at its warehouse at 1701 West 6th Avenue, Denver, Colorado, and on August 7, 1968, until August 9, 1968, Respondent did authorize, establish and maintain pickets at the premises of Sears at its retail store at 2375 East 1st Avenue, Denver, Colorado.

(q) By the acts and conduct set forth in subparagraph (n) above, Respondent has engaged in, and has induced and encouraged individuals employed by Sears and by other persons engaged in commerce or in industries affecting commerce, to engage in, strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services, and has threatened, restrained, and coerced Sears and other persons engaged in commerce or in industries affecting commerce.

(r) An object of the acts and conduct engaged in by Respondent set forth in subparagraphs (p) and (q) above, was and is to force or require Sears to cease using, selling, handling, transporting, or otherwise dealing in the products of and to cease doing business with Joe and Eddie's, Duke's Mozzicato, Harris, Sea-Ro, G & H, Clark, and E & R.

6. It may fairly be anticipated that, unless enjoined, Respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (p), (q), and (r) above, or similar or like acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. It is

therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10(l) thereof, that, pending final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

WHEREFORE, Petitioner prays:

1. That the Court issue an order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved herein pending before the Board from:

(a) Picketing at or in the vicinity of the premises of Sears, or at or in the vicinity of any other person engaged in commerce or in an industry affecting commerce doing business with Joe and Eddie's, Duke's, Mozzicato, Harris, Sea-Ro, G & H, Clark, and E & R.

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or by any like or related acts or conducts, or by permitting any such to remain in existence or effect, engaging in, or inducing, or encouraging any individual employed by Sears, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Sears, or any other persons engaged in commerce or in an industry

affecting commerce, where in either case an object thereof is to force or require Sears or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with Joe and Eddie's, Duke's, Mozzicato, Harris, Sea-Ro, G & H, Clark, and E & R.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining Respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Denver, Colorado, this 29th day of August, 1968.

s/ CLYDE F. WAERS,
Clyde F. Waers, Regional Director, Twenty-Seventh Region, National Labor Relations Board.
Room 260 New Custom House,
721—19th Street,
Denver, Colorado, 80202.

ARNOLD ORDMAN,
General Counsel.
DOMINICK L. MANOLA,
Associate General Counsel.
JULIUS G. SEROT,
Assistant General Counsel.
FRANCIS SPERANDEO,
Regional Attorney, Region 27.
/s/ RICHARD J. WISE,
Board Attorney.
National Labor Relations Board,
Twenty-Seventh Region,
Room 260 New Custom House,
721—19th Street—Denver, Colorado, 80202,
297-3551.

EXHIBIT 1.

Form NLRB-508
(12-65)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Instructions: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write In This Space

Case No. 27-CC-278
Date Filed August 9, 1968

1. Labor Organization Or Its Agents Against Which Charge Is Brought

   a. Name
   Carpet and Linoleum Layers Union, Local 419

   b. Union Representative to Contract
   Mr. G. Cooney

   c. Phone No.
   244-4884

   d. Address (Street, city, State and ZIP code)
   1129 15th Street, Denver, Colorado

   e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in

unfair labor practices within the meaning of section 8(b), subsection (4) (i) (ii) (B) of the National
(List Subsections)
Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)
Since on or about August 7, 1968, and continuing to date, the above-named labor organization has induced and encouraged individuals engaged in commerce or in an industry affecting commerce to refuse to transport and or perform services for Sears, Roebuck and Co. and has threatened, restrained and or coerced persons engaged in commerce or in an industry affecting commerce with the object in both cases of forcing Sears, Roebuck and Co. to cease doing business with various independent contractor carpet and linoleum installers and or to force said contractors to recognize the above-named labor organization as the representative of the employees of said contractors.

3. Name of Employer
Sears, Roebuck and Co.

4. Location of Plant Involved (Street, city, State and ZIP code)
2375 E. 1st Ave. and 1701 W. 6th Ave.,
Denver, Colorado

5. Type of Establishment (Factory, mine, wholesaler, etc.)
Retail Store

6. Identify Principal Product or Service
Retail Merchandise

7. No. of Workers Employed
approx. 750

8. Full Name of Party Filing Charge
Lederer, Barnhill & Fox for Sears, Roebuck and Co.

9. Address of Party Filing Charge (Street, city, State and ZIP code)
33 S. Clark St., Chicago, Illinois 60603

10. Telephone No.
312-CE 6-1224

11. Declaration
I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Lawrence M. Cohen — *Attorney*
(Signature of representative or person making charge) — (Title or office, if any)

Address 33 S. Clark St., Chicago, Illinois

CE 6-1224 — Aug. 9, 1968
(Telephone number) — (Date)

Willfully False Statements On This Charge Can Be Punished By Fine And Imprisonment (U. S. Code, Title 18, Section 1001)

GPO 911-597

RELEVANT TRANSCRIPT REFERENCES FROM HEARING IN THE DISTRICT COURT OF SEPTEMBER 10, 1968 ON THE REGIONAL DIRECTOR'S "PETITION FOR INJUNCTION UNDER SECTION 10(e) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED":

[21] Mr. Giacomini: I have one short matter of housekeeping to take up with the Court. I would like to file the entry of appearance on behalf of Rothgerber, Appel and Powers, and I'd like at this time, Your Honor, to move the admission orally of—

The Court: Wait a minute, now. Don't they have to intervene?

Mr. Giacomini: We do not seek to intervene. Pursuant to the act, the charging party is entitled to be present in court and represented by counsel to present any testimony.

[22] The Court: Do you have any objection?

Mr. Hornbein: It's my understanding they have a right to appear for the limited purpose of introducing evidence and presenting testimony and for that purpose only, and we have no objection to that.

The Court: Very well.

Mr. Giacomini: Should that come up during the hearing, Your Honor, we would do so through counsel that we have retained to represent us and help us and assist us in this case. I'd like to move the admission orally of Mr. Kalvin M. Grove of the firm of Lederer, Barnhill and Fox, 33 South Clark Street, Chicago, Illinois. Mr. Grove is a graduate of the University of Michigan and De Paul University where he received his B.A. He is a member of the Illinois and Florida Bar Associations and a former member of the NLRB from 1960 to 1965. He is a contributing

author to the ABDB Journal and we can vouch for his character.

The Court: Very well, he will be admitted for the purposes of this case.

[159] Mr. Giacomini: Your Honor, so long as you're allowing the government to file a brief, if Sears decides to, may we file one within the same time?

The Court: Why don't you just join with them and give them any counsel you can. Your interests are the same.

Mr. Giacomini: Yes, sir.

The Court: I mean, there's no particular need for separate briefs. So, anything you want to submit to them beforehand, you go right ahead, or, in conjunction with it.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Twenty-Seventh Region.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO and SEARS, ROEBUCK & CO.	CASE NO. 27-CC-278.

COMPLAINT AND NOTICE OF HEARING.

It having been charged by Sears, Roebuck & Co. (herein called Sears), that Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO (herein called Respondent), has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U. S. C., Sec. 151, *et seq.*, 73 Stat. 519 (herein called the Act), the General Counsel for the National Labor Relations Board (herein called the General Counsel and the Board, respectively), on behalf of the Board, by the undersigned Regional Director for the Twenty-Seventh Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing, and alleges as follows:

I.

The charge herein was filed by Sears on August 9, 1968, and served on Respondent by registered mail on August 9, 1968.

II.

(a) Sears is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the State of New York.

(b) At all times material herein, Sears has maintained a store and place of business at 2375 East First Avenue, Denver, Colorado, and has maintained a warehouse at 1701 West Sixth Avenue, Denver, Colorado. These two locations of Sears are the only locations of Sears in the Denver area involved in the proceedings herein.

(c) Annually in the course and conduct of its business operations, Sears sold and distributed at its store at 2375 East First Avenue, Denver, Colorado, and at its warehouse at 1701 West Sixth Avenue, Denver, Colorado, goods and products valued in excess of $500,000.

(d) Annually in the course and conduct of its business operations, Sears purchased, transferred and delivered to its store and place of business at 2375 East First Avenue, Denver, Colorado, and to its warehouse at 1701 West Sixth Avenue, Denver, Colorado, goods and materials valued in excess of $50,000, which goods and materials were transported to said store and warehouse directly from state of the United States other than the State of Colorado.

(e) Sears is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(f) Daryl Massey, an individual, doing business as Duke's Floor Covering (herein called Duke's), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Duke's regularly provides services to Sears, among others.

(g) Joseph Mozzicato, an individual (herein called Mozzicato), is engaged in the business of installing floor coverings in Lakewood, Colorado. In the course and con-

duct of his business, Mozzicato regularly provides services to Sears, among others.

(h) Francis H. Harris, an individual, d/b/a Frank Harris Tile Company (herein called Harris), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Harris regularly provides services to Sears, among others.

(i) John Erpelding, an individual, d/b/a Sea-Ro Tile (herein called Sea-Ro), is engaged in the business of tile installation in Denver, Colorado. In the course and conduct of its business, Sea-Ro regularly provides services to Sears, among others.

(j) Gerald Fallert, an individual, d/b/a G. & H. Tile (herein called G & H), is engaged in the business of installing tile in Denver, Colorado. In the course and conduct of its business, G & H regularly provides services to Sears, among others.

(k) Joe and Eddie's Carpet Service (herein called Joe and Eddie's) is a partnership engaged in the business of carpet installing in Denver, Colorado. In the course and conduct of its business, Joe and Eddie's regularly provides services to Sears, among others.

(l) Paul E. Clark, an individual, d/b/a Clark Carpet Service (herein called Clark), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Clark regularly provides services to Sears, among others.

(m) Elmer Neff, Jr., an individual, d/b/a E & R Carpets (herein called E & R) is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, E & R regularly provides services to Sears, among others.

III.

Respondent is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

IV.

(a) Since on or about July 15, 1968, Respondent has demanded that Joe and Eddie's recognize and bargain with it as the representative of the employees of Joe and Eddie's.

(b) At no time material herein has Respondent had any labor dispute with Sears.

V.

(a) In furtherance of its demands referred to above in paragraph IV and for reasons unrelated to its relationship with Sears, Respondent, commencing on or about August 2, 1968, until August 8, 1968, did authorize, establish, and maintain pickets at the premises of Sears at its retail store at 2201 East Fifth Avenue, Denver, Colorado.

(b) In furtherance of its demands referred to above in paragraph IV and for reasons unrelated to its relationships with Sears, Respondent, commencing on or about August 8, 1968, and continuing to date, did authorize, establish, and maintain pickets at the premises of Sears at its warehouse at 2701 West Sixth Avenue, Denver, Colorado.

VI.

By the acts and conduct set forth in paragraph V above, Respondent has engaged in and has induced and encouraged, and is engaging in and is inducing and encouraging individuals employed by Sears, and by other persons engaged in commerce or in an industry affecting commerce, to engage in strikes or refusals, in the course of their employment, to use, manufacture, process, transport, or other-

wise handle or work on goods, materials, articles, or other commodities, or to perform services, and have threatened, coerced and restrained, and are threatening, coercing and restraining, Sears and other persons engaged in commerce, or in industries affecting commerce.

VII.

An object of the acts and conduct engaged in by Respondent set forth in paragraphs V and VI was, and is, to force or require Sears to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with Joe and Eddie's, Duke's, Mozzicato, Harris, Sea-Ro, G & H, Clark and E & R.

VIII.

By the acts described in paragraphs V and VI above, and by each of said acts, Respondent did engage in, and is engaging in; and did induce and encourage, and is inducing and encouraging, individuals employed by persons engaged in commerce, or in an industry affecting commerce, to engage in a strike or a refusal in the course of their employment, to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, and to perform services, and did threaten, coerce, restrain, and is threatening, coercing and restraining, persons engaged in commerce or in an industry affecting commerce, where an object thereof is, as described above in paragraph VII, forcing or requiring persons to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor or manufacturer, and to cease doing business with other persons, and thereby did engage in, and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) and Section 2(6) and (7) of the Act.

IX.

The acts of Respondent as described in Paragraphs V and VI above, occurring in connection with the operations of Sears, described in paragraph II above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce, and the free flow of commerce.

X.

The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii)(B) and Section 2(6) and (7) of the Act.

Please Take Notice that on the 3rd day of October, 1968, at 10:00 a.m. (MDT), at

Room 260 New Custom House
721-19th Street
Denver, Colorado

a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board, on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB 4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases as Taken from the Board's Published Rules and Regulations and Statements of Procedure, is attached.

You Are Further Notified that pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned Regional Director, acting in this matter as

agent for the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Denver, Colorado, this 29th day of August, 1968.

(SEAL)

/s/ CLYDE F. WAERS,
Clyde F. Waers,
Regional Director, Fourteenth Region, National Labor Relations Board,
Room 200,
New Custom House,
721 19th Street,
Denver, Colorado 80202.

IN THE UNITED STATES DISTRICT COURT.

[Title omitted in printing]

(Filed United States District Court, Denver, Colorado, Oct. 4, 1968. G. Walter Bowman, Clerk.)

REPORTER'S TRANSCRIPT.

BE IT REMEMBERED, that the above-entitled matter came on for hearing before The Honorable William E. Doyle, Judge, presiding, Courtroom D, U. S. Court House, Denver, Colorado, at or about the hour of 3:00 o'clock p.m. Friday, September 27, 1968.

Appearances:

J. Richard Wise, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver, Colorado; and

[2] Francis Speranzeo, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver Colorado; and

W. Bruce Gillis, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver, Colorado; on behalf of Petitioner.

Donald L. Graconnini, Esq., Attorney at Law, Security Life Building, Denver, Colorado, appearing on behalf of Sears Roebuck & Co.

Philip Hornbein, Jr., Esq., Attorney at Law, 2007 Security Life Building, Denver, Colorado, appearing on behalf of Respondent.

Whereupon, the following proceedings were had, to wit:

[3] Proceedings.

The Court: I asked you to come in today so that I could give you my views of the case. Because, I think there is some urgency about it from the standpoint of both sides. I just received the last memorandum a couple of days ago; I have been buried in trials and other work. So I thought it would be helpful to both of you if I were to just, the best I can, give you my expression as to how I feel about it.

This is an action in which the plaintiff, Waers, Regional Director of the Twenty-seventh Region of the National Labor Relations Board, on behalf of the National Labor Relations Board, seeks injunctive relief against the Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, charging that the respondent has been guilty of an unfair labor practice and that it has been picketing the Sears, Roebuck outlets; Cherry Creek and on West Sixth Avenue.

It is alleged that Joe and Eddie's Carpet Service, a partnership, engaged in the business of carpet installation; that that company that association together with others who are enumerated in the Complaint furnished service to Sears. The allegation is that in essence these installers are in a relationship of independent con- [4] tractors to Sears and, thus, the organization's efforts on the part of the respondent are a violation of Section 8(b)(4) of the National Labor Relations Act.

We heard evidence in the matter, which was a question of fact, basically.

I find and determine that the Court has jurisdiction over the case. I note in passing that at the conclusion of the evidentiary hearing, that I made certain findings, and I might run over them now.

At that time I said, "It appears to me that it's not an

ordinary employee relationship; that Sears does, however, contract the whole job; that is, the carpeting or floor covering, plus the services. And, carries the responsibility of seeing to it that the job is satisfactory, because it is a Sears customer. It does not appear, however, that the employee is subject to regular hours; doesn't appear that he gets any of the fringe benefits that other employees get, such as health and welfare benefits and perhaps a pension; the profit-sharing, and some other things that were described that are available to ordinary commissioned or salaried employees at Sears, Roebuck."

The evidence showed that each of them was eligible, on a one day discount pass, whereby they could buy merchandise for ten percent off.

I went on to say: "On the other hand, it does [5] seem to me that Sears has a vital interest in the price of this from what has been presented here because they want to compete in the community. Perhaps more than that, they wish to be able to keep their prices below those of other concerns. And so, this is evident from the fact and the testimony that they have recently found that their margin of profit was nil because the service was eating it all up. So, they insisted on having a $1.35 rate per yard."

And then I said: "Is that right?" And Mr. Wise answered: "Yes."

The evidence shows, as I recall it, that the overall price had been $1.65, and the installers were paying some of the extra expenses such as moving furniture and taking up old carpeting. And, that Sears then negotiated this lower rate.

I then went on to say: "And these facts are pretty well established and undisputed. On the other hand, these fellows appear to be entrepreneurs in some degree because they can take up their work. As I say, they don't get the other benefits that Sears offers its employees, although

they get a ten percent discount on request and application. Isn't that right? Mr. Wise: Yes, sir."

Then I said, "So under these circumstances, I guess the matters are realy conclusions of law more than they are findings of fact, aren't they?" And, it was men- [6] tioned that the installers are ultimately responsible for guaranteeing their workmanship and certainly this is true. And, Mr. Wise said: "The contract does state the installers are responsible for guaranteeing their workmanship and so on and have to pay for any damages which would not make Sears entirely responsible." And I say, "They have to indemnify Sears. For bad workmanship." For example.

I go on to say: "Sears continues to bear the responsibility so far as the customer is concerned. Mr. Wise: I think this is because of the economic factors."

Then I say, "Also Sears is responsible for collecting. The testimony is undisputed that these contractors have nothing whatsoever to do with collecting from the purchaser. Sears does this through its machinery; its credit plan or system. And, if there is a loss as a result of a bad debt or bankruptcy, why, Sears bears the risk of the loss."

I might also add that the relationship arises as a result of the printed contract between Sears and the installer. It doesn't say that here, but I say it. It's prepared by Sears. It sets forth the various stipulations between it and the installer.

All right. It's a very interesting question as to whether as to the basis for Board action or for a holding of unfair labor practice, but my view is that it's [7] not that there is no probability even that the Board will so find. Section 8(b)(4)(A) or Section 8(b)(4)(B), under the 1959 amendment is designed to protect innocent third parties, as I see it, from economic loss as a result of a labor dispute in which they have no concern. This was mentioned in NLRB against Brotherhood of Carpenters and Joiners,

184 F. 2d, p. 60. There are a couple of District of Columbia cases that I think are pertinent. One is Local Union No. 24 of the Teamsters against NLRB, 266 F. 2d 675 at p. 680. This was in the D. C. Circuit, 1959, wherein the court says: "Arrangements of the type here disclosed must be scrutinized by the Board with great care because of the danger that they may be used by the real parties in interest as a device to achieve insulation from union activity." Citing cases. And, citing Local No. 24, Teamsters against National Labor Relations Board, 105 U. S. Appeals, D. C. 271, 276; 266 F. 2d 675, 680 (1959).

And, it goes on: "Of course, in an area so wide as is the field of Labor Relations, there are many situations in which the answer to a dispute under 8(b)(4)(B) is easily derived by the application of such legalistic formulae as 'independent contractors, co-employers, or allies.' But it is equally clear that there is a zone of dispute in which such formulae are useless, and the answer must be derived by applying the intent of the statute to the facts [8] in the case.

"The inquiry in the present case was limited to whether Todaro was an 'independent contractor'. We think it clear, however, that Todaro's relationship to Terminal was in the 'zone of dispute in which such formulae are useless' and that 'applying the intent of the statute to the facts in the case' required consideration of such facts as, for example, the history of Todaro's relationship to Terminal; the conduct of his cleaning business and its relationship to Terminal's business; the Terminal's influence on, if not control over, Todaro's labor policy. In our view, these facts make one capable the conclusion that Terminal was not a neutral within the meaning of the statute."

So the question should be whether the respondent is neutral. I'm not sure. I'm convinced that a categorical approach to this in terms of common law relationship is

not the proper approach, since this is an effort to charge and convict the respondent of an unfair labor practice which in essence is a secondary boycott. The other side of this is that a person boycotted must be someone who is wholly secondary and lacking interest in the controversy; someone who is an innocent bystander, so to speak. And I do not see—looking at the facts here, it's plain to me that the relationship is not that of employer-employee, but at the same time I think that it is somewhat a legalistic relation- [9] ship; an arrangement. And, that a real effort has been made to see to it that it looks like an independent contractor relationship.

The Board itself in a case that is quite similar to this reached the same conclusion that I reach. I refer to Local No. 2265 against Carpet Center, Inc., Case No. 7-CC-397, in which the facts are quite similar.

I would say this: that this one was somewhat stronger than the case at bar in that there was a closer relationship between the petitioner and the carpet layers. But, in the course of the trial, the examiner went on the ground that this was in substance, in reality, an employee relationship.

I do not think that I have to so find. I think that it's sufficient to find and determine and hold as I do that Sears is vitally interested in the price—in the installation price. The installation price was the big element in the total price that was charged the customer. And so, it was vitally interested in whether or not the installers were members of the respondent union. They were not strangers. They were not innocent neutrals. And consequently, I do not see that this case is one for the issuance of injunction, which is extraordinary relief, even though it is statutory. I agree it is. I see little probability that when this matter comes before the Board that [10] the relief that is sought will be granted.

That being the case, I do not think that the petitioner makes out a case for temporary injunctive relief here.

So, the request of the petitioner will be denied and the Complaint will be dismissed and the cause of action will be dismissed. This is a final judgment.

UNITED STATES DISTRICT COURT

For the District of Colorado.

CLYDE F. WAERS, Regional Director of the Twenty Seventh Region of the National Labor Relations Board; for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Petitioner*, vs. CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Respondent*.	Civil Action No. C-1052.

JUDGMENT OF DISMISSAL.

[Filed October 2, 1968.]

This Case having been tried to the Court on September 10, 1968, and the parties having requested and been granted leave to file post trial briefs in support of their respective positions; and the Court having considered the evidence and the arguments and briefs of counsel, and being sufficiently advised in the premises, having given its oral opinion and decision in the case on September 27, 1968, and on this date

DOTH FIND AND CONCLUDE:

1. The Court has jurisdiction over the parties and the subject matter of this action by virtue of Sec. 10(1) of the National Labor Relations Act as amended, 29 U. S. C. § 160(1).

2. It does not appear from the evidence that there is any probability that the National Labor Relations Board will ultimately find that respondent has engaged in an unfair labor practice under Sec. 8(b)(4)(B) of the said Act (29 U. S. C. § 158(b)(4)(B)).

3. This is not a proper case in which to grant injunctive relief under Sec. 10(1) of the said Act.

IT IS THEREFORE THE JUDGMENT OF THE COURT that the petition herein and this action be, and hereby are, dismissed.

DONE at Denver, Colorado, this 1st day of October, 1968.

BY THE COURT:

s/ WILLIAM E. DOYLE,
District Judge.

Approved as to form:

s/ RICHARD J. WISE,
Attorney for Petitioner

United States District Court

For the District of Colorado.

Title omitted in printing.)

NOTICE OF APPEAL.

Notice is hereby given: That Sears, Roebuck & Co., Complainant before the National Labor Relations Board, the Petitioner above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Judgment of Dismissal entered in this action on October 1, 1968 and filed on October 2, 1968.

Rothgerber, Appel & Powers,
By Donald L. Giacomini,
2930 Security Life Building,
Denver, Colorado 80202, 222-3526,

Nalvin Grove,
of Lederer, Barnhill & Fox,
111 West Washington Street,
Chicago, Illinois 60602,

Stefan Smetana,
325 South Homan,
Chicago, Illinois,

Attorneys for Appellant, Sears, Roebuck & Co.

[Filed November 20, 1968.]

[Certificate of service omitted in printing.]

IN THE UNITED STATES COURT OF APPEALS

For the Tenth Judicial Circuit

SEARS, ROEBUCK AND CO., *Appellant*, vs. CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, AND CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Appellees*.	Civil Action No.

DOCKET STATEMENT

[Filed January 8, 1969.]

Pursuant to Rule 9 of the Revised Rules of the United States Court of Appeals for the Tenth Circuit, Appellant submits the following Docketing Statement.

1. NATURE OF THE PROCEEDINGS:

Appeal is taken from the oral opinion and judgment of dismissal of United States District Judge William E. Doyle, denying injunctive relief under Section 10(l) of the National Relations Act, as amended, 29 U. S. C., Section 160(l).

2. DATE OF THE ORDER AND JUDGMENT:

The oral opinion was rendered on September 27, 1968, and the judgment of dismissal was dated October 1, 1968.

grant injunctive relief," and dismissed the petition and action.

The Regional Director has not filed an appeal from the adverse decision. However, Sears, characterizing itself as "charging party and complainant before the [Board]", has filed this appeal from the oral opinion and judgment of dismissal below. The Union has filed a motion to dismiss the appeal, or in the alternative to affirm the judgment of the district court. As the appeal is not properly before this Court, an affirmance or reversal of the judgment below is not warranted. However, we submit that the appeal should be dismissed because Sears has no standing to prosecute this appeal.

1. Sears was not and is not a party to the injunction proceeding. The general rule is well established, that only a party litigant can appeal from a judgment of a district court. See *United States ex rel. State of Louisiana* v. *Jack*, 244 U. S. 397, 402 (1917); *United States* v. *McFadden Express, Inc.*, 310 F. 2d 799, 801 (C. A. 2, 1962); *First Iowa Hydro Electric Cooperative* v. *Iowa-Illinois Gas & Electric Co.*, 245 F. 2d 630 (C. A. 8, 1957); *Fenner Business Schools, Inc.* v. *School of Speedwriting, Inc.*, 234 F. 2d 1, 3 (C. A. 1, 1956), cert. denied 352 U. S. 942; *United States* v. *Seigel*, 168 F. 2d 143 (C. A. D. C., 1948); 9 Moore's Federal Practice, para. 73.04.

2. Sears has no standing to intervene as a party plaintiff or to file an appeal from an order denying injunctive relief in a proceeding under Section 10(l) of the Act. Section 10(l) of the Act provides in pertinent part that:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.

> If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law:
>
> . . . Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: . . .

Section 10(l) of the Act constitutes a grant of power to the Board to obtain interim injunctive relief against conduct violative of specified provisions of the Act pending the final outcome of Board litigation. The injunctive relief contemplated by the Section is ancillary to Board proceedings and the power to seek such relief is vested exclusively in the Board. Accordingly, Sears has no standing to file an appeal and thereby to petition this Court to grant the injunctive relief which was denied by the court below. Compare *Phillips* v. *United Mine Workers, District 19*, 218 F. Supp. 103 (E. D. Tenn., 1963); *Douds* v. *Wine Liquor & Distillery Workers Union*, 75 F. Supp. 447, 448 (N. D. N. Y., 1948); *Shore* v. *Building and Construction Trades Council*, 50 LRRM 2139 (W. D. Pa., 1962); *Reynolds* v. *Marlene Industries Corporation*, 250 F. Supp. 722 (S. D. N. Y., 1966); *Penello* v. *Burlington Industries*, 54 LRRM

2165 (W. D. Va., 1963). In several cases involving appeals from injunctions under Section 10(l) or its statutory counterpart, Section 10(j),[2] Courts of Appeals have refused to permit the charging party before the Board to intervene as a party-appellee, when the Board has opposed such intervention because of lack of standing: *Retail Clerks Union* v. *Food Employers Council*, 351 F. 2d 525, 528 (C. A. 9, 1965); *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, Appeal Nos. 22767, etc. (C. A. 9), unreported order rescinding order permitting intervention by charging parties entered May 31, 1968, cert. denied *sub nom. Los Angeles Herald Examiner* v. *San Francisco-Oakland Newspaper Guild*, U. S. , October 28, 1968; *Firestone Synthetic Rubber & Latex Company* v. *Potter*, Appeal No. 25577 (C. A. 5), unreported order denying motion to intervene entered January 19, 1968. To our knowledge, no Court of Appeals has permitted intervention by the charging party in a Section 10(l) or 10(j) appeal when the issue of such intervention has been litigated by the Board.

3. The rights of a charging party in a Section 10(l) injunction proceeding are limited to appearance by counsel and presentation of relevant testimony; and the charging party cannot, by intervention or otherwise, seek injunctive relief independently of the Board.

Sears, by describing itself as "an aggrieved party and a charging party before the [Board]" (Amended docketing statement, p. 1), apparently intends to rely on *Automobile Workers* v. *Fafnir Bearing Company*, 382 U. S. 205 (1965), as authority for the filing of this appeal. Such reliance is misplaced. That case does not deal with temporary in-

2. Section 10(l) imposes on the Board a mandatory duty to seek injunctive relief whenever a complaint is to be issued alleging unfair labor practices covered by that Section, such as secondary boycotts, whereas 10(j) gives the Board discretion to seek injunctive relief when a complaint is issued involving other unfair labor practices.

junction proceedings under Section 10(l) of the Act. In *Fafnir* the Supreme Court dealt solely with the right of a party filing an unfair labor practice charge to intervene in the court of appeals proceeding which reviews or enforces the final Board order. The Act, in Sections 10(e) and (f), gives the Board authority to petition a court of appeals to enforce a Board order and also authorizes the "aggrieved party," the losing party before the Board, to seek review of the order in the court of appeals, but it does not expressly refer to the rights of the successful party before the Board in an enforcement or review proceeding before a court of appeals.

In permitting an "aggrieved party" to petition a court of appeals for review of a Board order, the statute in effect permits a charging party before the Board whose charges have been dismissed by the Board to apply to a court of appeals for the ultimate injunctive relief which the Board felt was not warranted. A court of appeals decree enforcing a Board order is, of course, in the nature of an injunctive decree. A Board order is not self-enforcing. When it issues an order and petitions a court of appeals for enforcement thereof, it is seeking a court injunction. When the Board dismisses the charges but the "aggrieved party" petitions for review in a court of appeals it, in effect, is seeking a court injunction. In affording the "aggrieved party" such right to petition for review, the statute confers upon that private party the right to seek a court injunction. In short, the statute expressly recognizes this limited exception to the proscription of the Norris-LaGuardia Act, 29 U. S. C. A. Sec. 107, against the grant of injunctions in labor disputes at the request of private parties.

Sections 10(e) and (f) of the Act, however, although specifically referring to the "aggrieved party" make no reference to the rights of the successful party in the pro-

ceeding before the Board. Noting that in this connection the Act was "silent on the intervention problem", the court looked "to the statutory design of the Act" and concluded that "Congress intended to confer intervention rights upon the successful party to the Labor Board proceedings in the court in which the unsuccessful party challenges the Board decision." (382 U. S. at pp. 208-210). The reasons for the court's decision are fully set forth therein and need not for present purposes be described. It is essential to note, however, that in the *Fafnir* case the Supreme Court was construing Sections 10(e) and (f) of the Act which deal with the ultimate, final, court injunctions following a Board decision in which all parties concerned had the right to fully litigate the merits of the charge; and the case did not involve a temporary injunction ancillary to the Board proceedings, which does not require full and complete litigation of all pertinent issues, a proceeding which contemplates that the parties will still have their day in court before the Board and in the court of appeals under Section 10(e) or (f), but recognizes that in the interim a temporary injunction is required to prevent injury to the public welfare.

Unlike Sections 10(e) and (f), Section 10(l) is not silent as to the rights of the parties. The charged party, of course, has the right to fully defend against a petition for an injunction in the proceedings before the district court; and the statute expressly gives the charging party the right to appear and present all relevant testimony. This limited right conferred upon the charging party, the right "to appear by counsel and present any relevant testimony" was deliberately designed by Congress to limit the rights of a charging party in an injunction proceeding under Section 10(l) to do just that and no more, i.e., to appear and present relevant testimony. The legislative history and the decisions of the courts make it abundantly clear that al-

though the scheme of the Act was to permit private parties full participation with all the rights of private parties in the proceedings before the Board and subsequent proceedings in a court of appeals, Congress deliberately limited the rights of the charging party to the presentation of relevant testimony in proceedings to secure a temporary, ancillary injunction, for "the principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant." *McLeod* v. *Mechanics Conference Board*, 300 F. 2d 237, 242-243 (C. A. 2, 1962). Compare *Dunn* v. *Retail Clerks*, 307 F. 2d 285, 288 (C. A. 6, 1962); *Meekins* v. *Boire*, 320 U. S. 445, 448 (C. A. 5, 1963).

4. As the Court pointed out in *Meekins, Inc.* v. *Boire*, *supra*, at p. 448, the "Norris-LaGuardia Act specifically prohibits the issuance of injunctions in labor suits except under certain circumstances which are not here alleged." 29 U. S. C. A. Sec. 107. With the exceptions not here relevant, the statute deprived the district courts of jurisdiction to issue injunctions against strikes or picketing by labor unions in support of a labor dispute. It is well settled that when Congress, in enacting Section 10(l) returned to the district courts a measure of jurisdiction to issue injunctions in certain labor dispute situations, such jurisdiction was limited to injunctions "obtained only at the instance of the National Labor Relations Board . . ." and not private litigants. *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 204 (1962). See also, *Meekins* v. *Boire*, *supra*, 320 F. 2d at 448-449; *McLeod* v. *Mechanics Conference Board*, *supra* 300 F. 2d at 242-243; *Int'l. Longshoremen's Union, Local 6* v. *Sunset Line & Twine Co.*, 77 F. Supp. 119 (N. D. Cal. 1948); *Amazon Cotton Mills Co.* v. *Textile Workers Union*, 167 F. 2d 183,

186-187 (C. A. 4, 1948); and cases there cited. When Section 10(l) first was enacted, in 1947, Congress debated this very point and expressly rejected a House proposal to permit injunctons "at the request of private persons." House Conf. Rept. No. 510, on H. R. 3020, p. 57; 1 Legislative History of LMRA, 1947, p. 561. "Congress was intent upon taking the Federal courts out of the labor injunction business except in the very limited circumstances left open: . . ." *Marine Cooks Union* v. *Panama S. S. Co.*, 362 U. S. 365, 369 (1960). See also *Meckins* v. *Boire*, *supra* 320 F. 2d at 448; *Dunn* v. *Retail Clerks*, *supra* 307 F. 2d at 288.

Because the Norris-LaGuardia Act is "such a longstanding, carefully thought out and highly significant part of this country's labor legislation" (*Sinclair Refining Co.* v. *Atkinson*, *supra*, 370 U. S. at 203) the Supreme Court has consistently stricken down attempts to restrict, modify or dilute its impact by judicial interpretation.[3]

Congress has been specific where it intended to permit private litigants an exception to the Norris-LaGuardia ban. Thus, Section 302 of the Labor Management Relations Act (61 Stat. 157, 29 U. S. C., Sec. 186) prohibits certain employer payments to employee representatives, and, in recognition of the unusually sensitive and important nature of the problem, expressly permits private litigants to seek an injunction without regard to Norris-LaGuardia. See, Sec. 302(e), 29 U. S. C., Sec. 186(e). But this section "stands alone in expressly permitting suits for injunctions . . . by private litigants . . ." (*Sinclair Refining Co., supra*;

3. See, e.g. *Sinclair Refining Co., supra*; *Marine Cooks, supra*; *United States* v. *Hutchinson*, 312 U. S. 219 (1941); *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U. S. 91 (1940); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 (1938); *Lauf* v. *Shinner*, 303 U. S. 323 (1938). See also *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797, 805 (1945).

370 U. S. at 205, n. 19). Accordingly, no additional exceptions should be implied by the courts for the Norris-LaGuardia Act "leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself." (*Sinclair Refining Co., supra*, 370 U. S. at 202).

We submit that logic and reason compel the conclusion that if a private litigant is barred from seeking an injunction by way of an independent suit, as in the *Sinclair* and *Meekins* cases, *supra*, he cannot utilize intervention as a guise to secure relief independently of the Board. Plainly, where the Board has obtained injunctive relief in a proceeding under Section 10(l) of the Act, to permit a private party, by means of intervention or otherwise, to seek independent relief, for example, instituting contempt proceedings, opposing dissolution of the injunction, or as in the instant case, filing an appeal from the denial of an injunction, would for all practical purposes convert the limited permissible statutory scheme into the prohibited private law suit. Thus the Supreme Court has held that private parties who initiated unfair labor practice charges may not prosecute a contempt action against the charged party in a Court which enforces the Board order; and the courts of appeals and district courts have held that in a Section 10(l) proceeding the charging party is precluded from intervening to obtain such relief. See *Amalgamated Utility Workers* v. *Consolidated Edison*, 309 U. S. 261 (1940); *McLeod* v. *Mechanics Conference Board*, *supra* 300 F. 2d at 242-3; *Phillips* v. *United Mine Workers, District 19*, *supra* 218 F. Supp. 103; *Shore* v. *Building and Construction Trades Council*, *supra* 50 LRRM 2139 (W. D. Pa.). Cf. *Retail Clerks* v. *Food Employers Council*, *supra*, 351 F. 2d at 528.

For the foregoing reasons, it is respectfully submitted that the appeal be dismissed.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

JULIUS G. SEROT,
Assistant General Counsel,

JAMES T. YOUNGBLOOD,
Supervising Trial Attorney,

MARVIN ROTH,
Attorney,

National Labor Relations Board,
1717 Pennsylvania Avenue, NW.
Washington, D. C. 20570

February, 1969

[Affidavit of service omitted in printing.]

IN THE UNITED STATES COURT OF APPEALS

For the Tenth Circuit.

[Title omitted in printing.]

RESPONSE OF APPELLANT SEARS, ROEBUCK AND CO. TO MOTIONS OF APPELLEE AND PETITIONER TO DISMISS ITS APPEAL.

COMES NOW Sears, Roebuck and Co., Appellant, (hereinafter called Sears) and makes this Response to the Motions of Appellee Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, (hereinafter called the Union), and Petitioner Clyde F. Waers, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, (hereinafter called the Regional Director) to dismiss Sears' Appeal in this proceeding for lack of standing.[1]

Upon a charge filed by Sears with the Regional office, and pursuant to the direction of Section 10(l) of the National Labor Relations Act, 29 U. S. C. Section 160(1), on August 29, 1968, the Regional Director filed a petition for a temporary injunction to restrain the Union from engaging in described unlawful picketing of Sears. The Regional Director alleged and supported his belief that there was reasonable cause to believe that the Union had engaged in such unlawful conduct. Nonetheless, the District Court refused to grant the requested injunction. Despite the Regional

1. The Union's Motion under Rule 10 of this Court, also sought the affirmance of the District Court's decision from which Sear's Appeal was taken. Inasmuch as Sears is filing its Brief in support of its Appeal concurrently with this Response, we will not here address ourselves to that portion of the Union's Motion, but instead we refer the Court to our Brief which deals in detail with the Union's contentions.

Director's conclusion that such "reasonable cause" did in fact exist, and despite the absence of any subsequently discovered evidence to the contrary, the Regional Director failed to appeal the District Court's decision.[2] The Union's unlawful picketing continued thereafter,—and still continues. Accordingly, on January 8, 1969, Sears, the aggrieved Charging Party, filed its appeal of the District Court's decision.

Each of the Motions to Dismiss is predicated, in general, on two propositions. *First*, since Sears did not seek and was not granted formal intervention before the District Court, it cannot thereafter prosecute an appeal of that Court's decision, and *second*, since the right to obtain injunctive relief is restricted to the National Labor Relations Board, therefore Sears, as a private party, lacks standing to prosecute an appeal from a refusal to grant an injunction.

I. Introductory.

In arguing that Sears cannot appeal from the District Court's decision because it had not been granted the right to intervene there, each Motion therefore seems logically to imply that such an appeal would have been proper had intervention been sought and granted. However, if such an appeal represents an effort to secure an injunction which is permissible only to the National Labor Relations Board, as both Motions also argue, then it becomes totally irrelevant whether or not Sears, a private party, had intervened. Neither Motion deals with this logical and concep-

2. After a formal hearing on the merits, a Trial Examiner of the National Labor Relations Board concluded on February 6, 1969, Labor Board Case No. 27-CC-278, that violations of the law as alleged by the Regional Director's injunction petition had in fact been committed by the Union. The issuance of this decision has had no effect on the Union's picketing of Sears. The Trial Examiner's decision is attached to Sears' Brief in support of its Appeal.

tual inconsistency. May a charging party never appeal from an adverse decision in an injunction proceeding? Further, on what basis may one conclude that an appeal testing the correctness of the District Court's decision is legally equivalent to an effort to institute an injunction action? Neither Motion argues the point although both assume that equivalence.

These illustrative observations highlight certain defects in the contents of both Motions: they argue largely without analytical rigor; they assume the conclusions which are central to the dispute; they seek to support their assumptions with voluminous citation of cases which are frequently unrelated to the issues; they rely on propositions which have been discredited by legal scholars and the weight of recent precedent; and they seek to perpetuate a formalistic denial of rights to charging parties before the National Labor Relations Board in the face of a discernible movement in the law to broaden the range of such rights.

In essence, the Motions to dismiss this Appeal and Sears' Response thereto place in issue before this Court the question of the nature and extent of charging parties' rights in Section 10(l) injunction proceedings, which question is an integral part of the larger issue of charging parties' rights generally. The quality of the discussion which this issue has engendered in some courts, particularly with reference to rights in injunction cases, is susceptible of the same criticisms as have been levelled against the Motions to dismiss in the instant proceeding.

In recognition of the importance of these matters, together with the need to substitute reasoned argument for sloganizing, Sears respectfully submits the following discussion in aid of this Court's consideration of an emerging and unsettled area of the law.

II. The Status of Charging Parties in Injunction Proceedings Under Section 10(l): the Legislative History of Section 10(l) and the Statutory Language.

A. Legislative History.

The debates preceding the adoption of the Taft-Hartley amendments to the labor laws dealt extensively with the conflict between (i) the right of private parties to a speedy and effective remedy against the devastating effects of secondary boycotts and jurisdictional disputes, (ii) the need to retain the prohibitions against permitting courts to grant injunctions in labor disputes, as contained in the Norris-La Guardia Act, 47 Stat. 70 (1932), 29 U. S. C. §§ 101-15, and (iii) the need to preserve the scheme of the old Wagner Act in which procedures of the National Labor Relations Board were available for primary settlement of labor disputes. The nature of the conflict was clear. The speediest and most efficient manner for remedying an unlawful strike would be to permit the struck employer to seek an injunction without the delay inherent in awaiting the results of a hearing on the merits of the dispute before the Labor Board. Yet the abuses which had been occasioned by permitting employers to seek injunctive relief on their own motion, which abuses were thoroughly chronicled, for example, in *Frankfurter & Greene, The Labor Injunction* (1930), and which gave rise to Norris-La Guardia, were equally clear. Finally, despite the undoubted merit of a system whereby parties were required to resort to the procedures of a single expert agency for the resolution of their disputes, the need for some form of injunctive relief in aid of illegally picketed employers was also generally acknowledged.

By way of resolving these conflicting values, the House bill opted for permitting employers to move independently and unilaterally for injunctive relief.

> . . . The House bill [H. R. 3020], in section 12, provided for injunctions at the request of private persons, rather than by the Board, in [cases under Section 10(l)]. (*House Conference Report* No. 510, Leg. Hist. 561).

This provision was not adopted since it would have represented a substantial repeal of Norris-La Guardia. However, similar proposals were made in the Senate, evidencing the tangible support which existed for direct private injunctive relief.

Throughout the Senatorial debates on the Taft-Hartley amendments, one of the most serious and recurring disputes centered on the so-called Ball amendment. Senator Ball sought to convince his colleagues that private parties should be permitted to seek court injunctions whenever they were individually aggrieved by secondary boycotts and jurisdictional disputes, and without prior recourse to the Board. It was argued that this was the best method for avoiding potential harm (Leg. Hist. 561-562, 1057-1058, 1350). As argued by a supporter of this amendment, Senator Donnell,

> "[An injured party] should be entitled to engage his own attorney, go into a court which he selects, and direct the conduct of his litigation." (Leg. Hist. 1353.)

In opposition to this amendment, Senators Morse and Ellender, among others, argued that it would essentially repeal the Norris-La Guardia prohibition on injunctions in labor disputes. They argued further that for all matters reasonably cognizable under the labor laws, recourse should be had first to the Board rather than to proceed directly to the courts (Leg. Hist. 1057-1958, 1149, 1544). The Ball amendment, representing an extreme view of the manner in which the conflicting values should be resolved, was defeated sixty-two to twenty-eight (Leg. Hist. 1370).

The statute, as ultimately adopted, predictably repre-

sented a compromise. In order to provide a meaningful remedy for employers faced with unlawful picketing, injunctive relief was provided. However, in order to avoid a situation in which employers could forum-shop or achieve an independent development of the law through *their* selection of theories of violation and relief, *i.e.*, the abuses which gave rise to Norris-La Guardia, the right to *initiate* injunction suits was limited to the Board. Thus, Congress sought to afford employers an injunctive remedy while preserving the National Labor Relations Board's principal role in the labor field by confining to the Board's judgment both the identification of the cases in which injunctive petitions should be filed and, necessarily, the nature of the violations to be alleged and the limits of the relief to be sought therein.

The significance of this legislative background to the issue of the extent of charging parties' rights in injunction proceedings is threefold:

1) There existed substantial Congressional support for the proposition that charging parties before the Board who were victimized by illegal picketing should have a *right* of access to the courts in order to obtain relief and protection from such conduct.

2) Concern over a possible emasculation of Norris-La Guardia resulted in a compromise in which charging parties were prohibited only from *instituting* suits for injunction; no limitation on their *right* otherwise to participate in court proceedings in furtherance of such petitions, when filed by the Board, was either expressed or implied.

3) Since Section 10(l), as ultimately enacted, represented a compromise, as much of the contentions of the opposing sides as are consistent with the final enactment should be imported into its interpretation.

It follows, therefore, that Section 10(l) should be read to constitute charging parties before the Board as judicial "parties" in injunction proceedings in the courts whenever the Board has filed a petition for such relief. The charging parties' status as "parties" would include all the customary rights of parties or interveniors such as the right to appeal an adverse decision of the Court. Such an interpretation,—apart from giving effect to the equitable truism that one whose initiative and interest gives rise to a court proceeding and whose personal and property interests are vitally effected by its outcome should have a right to appeal an adverse ruling,—similarly gives effect both to the views of those legislators who sought to limit encroachment on Norris-La Guardia by preventing private parties from freely instituting injunction proceedings on their whim, and those others who sought to guarantee private parties the right to full access to the courts as the best means for protecting their vital interests.

B. The Statutory Language.

The conclusions we have stated regarding Congress' purpose to accord charging parties in 10(l) cases full rights of participation as "parties" in court proceedings instituted by the Board is reflected in the language of the statute. Section 10(l) which requires the Regional Director to file a petition for temporary injunctive relief whenever he has reasonable cause to believe that a union has engaged in enumerated unlawful acts of a particularly damaging nature to the affected employer, makes the following provision for participation by the charging party in the court proceedings:

> Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, *including the charging*

party, shall be given an opportunity to appear by counsel and present any relevant testimony. (Emphasis added.)

The rights of participation which are thus granted to charging parties substantially exceed those associated with an amicus status. While an amicus is limited to the filing of briefs, the express provision of Section 10(l) permits charging parties to offer contentious evidence, to call witnesses, to introduce documentary and other matter, as well as to make oral argument and file briefs. Had Congress intended to relegate charging parties merely to the role of an amicus, either in proceedings in the District *or Appellate Courts*, its role would not have been expressly expanded to permit such full and active participation as a matter of right.

It is instructive, in this regard, to note the difference between the language of Section 10(j) and 10(l) of the statute. Both sections authorize the Board, through its Regional Director, to institute petitions for injunctions when the latter believes that charged unions have engaged in unfair labor practices rendering such extraordinary relief appropriate. The sections differ in that pursuant to Section 10(j), injunctive relief *may* be sought for any violation of the statute except for those few enumerated in Section 10(l). The latter section, however, provides that such injunctive relief *must* be sought upon the commission of the unlawful acts there specified.

Whereas Section 10(l) requires that charging parties be notified of the filing of the petition and be permitted to appear by counsel and present any relevant testimony, Section 10(j) requires only that charging parties be notified of the filing of the petition. The difference in the nature and extent of the rights granted the respective charging parties in these sections is no doubt attributable to the fact that the unlawful acts referred to in Section 10(l) were con-

sidered to have the greatest possible potential for harm to their victims. It is manifest that Congress intended to confer on charging parties in 10(l) cases such rights of participation as would guarantee the fullest protection of their interests,—a guarantee beyond the presence of and representation by the Board.

Indeed, if Congress believed that the judgment and participation of the Board in 10(l) injunction proceedings would suffice to protect the charging parties' interests, and that the charging party should have no independent role in the prosecution of the case which was not circumscribed by the Board, then there was no need for Congress explicitly to confer rights on charging parties in 10(l) cases which were denied to those in 10(j) cases. The existence of a status in which charging parties are accorded an independent role in the protection of their recognized interests is inconsistent with a denial of their right to appeal a court's decision which is adverse to those interests. The denial of such a right would constitute also the denial of any independent status. It would create a situation in which the failure of the Board to appeal an adverse court decision, which failure might well be attributable to budgetary or manpower problems unrelated to the merits, would leave parties whose rights have been violated without means for remedying those violations.[3] It would, in short render meaningless Congress' deliberate distinction be-

3. It is true of course, that charging parties' allegations that they had been victimized by an illegal boycott or strike will ultimately be litigated in formal adversary proceedings. In this sense a remedy is afforded notwithstanding the denial of injunctive relief. However, this litigation, first before a Trial Examiner, then on review to the Board, extends over many months. When a boycott or strike does irreparable harm to the employer, as the Board's petition for an injunction as well as the statute's provision for injunctive relief admits, then a final order after so protracted a period constitutes no remedy at all. A victory before the Board, without earlier temporary injunctive relief, would consist of a pyrrhic victory few employers would survive to enjoy.

tween the rights conferred on charging parties in 10(j) and 10(l) cases. It follows, therefore, that Congress intended to accord charging parties in 10(l) cases the status of "parties", clothed with the rights of that status, including the right of appeal.

This conclusion finds support in the language of the Board's own "Rules and Regulations" which define the identity and rights of "parties".

Section 102.8 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, defines those who shall be deemed a "party" before it and includes in that group ". . . any person filing a charge or petition under the act, . . ."

Section 102.38, entitled "Rights of parties", provides as follows:

> "Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, . . ."

Section 101.10, defining parties' rights in formal hearings, provides that:

> ". . . all parties to the proceeding, and the trial examiner have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner."

According to the Board's Rules, therefore, charging parties are deemed "parties" in interest in Board proceedings, and the rights which they possess as "parties" are identical to those conferred on charging parties in Section 10(l). Put somewhat differently, "parties" before the Board are conferred no rights in the Board's Rules which are denied to charging parties in Section 10(l), it be-

comes exceedingly difficult to understand, consequently, how the Board can argue, as it does in its Motion to dismiss in this case, that the enumerated rights to participate in the proceedings of the District Court granted to charging parties in Section 10(l) constitutes them as less than "parties" in the court.

The more reasonable view, it is submitted, is that the use of virtually the same language by the Board and by Congress to confer the same rights should be understood to achieve, and to have intended to achieve, the same legal status. And just as parties before the Board may appeal adverse Board decisions to the Courts of Appeals, so also parties in 10(l) proceedings should be permitted to appeal adverse District Court decisions, all as a consequence of their status as "parties".

It follows further, that those who have by statute been made "parties" in District Court proceedings are not required to seek intervention in that Court. Thus, Sears' failure to have sought and secured such an order from the District Court in the instant proceeding does not bar it from prosecuting this appeal.

III. The Relevant Authorities.

Apart from the legislative history of Section 10(l) and an analysis of its language, the principal support for Sears' position comes from two recent decisions which render much of the earlier case law obsolete. These are *Retail Clerks Union, Local 137, et al.* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (CA 9, 1965), and *Automobile Workers* v. *Scofield (Fafnir Bearing Co., et al.)*, 382 U. S. 205 (1965).

Each of these authorities dealt with the question of the rights of charging parties before the Board to participate in the proceedings to which their charges gave rise.

A. The Retail Clerks Case:

In *Retail Clerks*, pursuant to an appropriate charge filed with him and his investigation thereof, a Regional Director filed a petition for a temporary injunction under Section 10(l) to prevent a union from enforcing an alleged "hot cargo" agreement. Thereafter the Regional Director executed a stipulation with the offending union according to which the latter would cease its alleged unlawful conduct. The Regional Director filed this stipulation in the District Court and sought to have its injunction petition dismissed. The charging parties objected to the stipulation and the dismissal of the petition. The District Court granted the injunction as requested by the charging parties and over the objection of the Regional Director. Moreover, when the charging parties objected to the scope of the injunction as granted, the Court modified its order in conformity with their request. The Regional Director and the union then appealed from the injunction order as modified.

In its appeal the Board argued that since the Regional Director alone is authorized to petition for an injunction under 10(l), and since the Regional Director determined not to do so subsequent to the filing of his petition, the District Court was therefore without authority to grant an injunction over his objection and at the request of the charging parties. To do so, continued the Board, would permit charging parties to secure injunctive relief in violation of the prohibition of the Norris-LaGuardia Act. In essence, these arguments are identical to those which are being urged upon this Court in both the Union's and the Petitioner's Motions to dismiss.

In rejecting these arguments, the Ninth Circuit's opinion, which affirmed the District Court's decision, made a number of points which are equally apt here, as that Court explored

the subject of charging parties' rights in 10(l) proceedings[4]

1. Section 10(l) makes it mandatory for the Regional Director to file for an injunction when he has reasonable cause to believe that the charging parties have alleged a violation of law covered by that Section. The Norris-LaGuardia Act prohibits courts from granting injunctions only when private charging parties file the injunction petitions in the first instance. Once such petition has been filed by the Regional Director, however, charging parties are free to pursue the objective of securing such an injunction so long as the theories and relief which they urge are consistent with the objectives of the Regional Director's petition. And courts may grant such petitions on the urging of the charging parties irrespective of the position taken by the Regional Director after the petition is filed.

Thus the Court made a critical distinction which the Board ignores; there is a legal difference between (i) instituting an injunction suit, and (ii) supporting it, whether or not such support is desired by or is consistent with subsequent positions taken by the Regional Director. Since Norris-LaGuardia is irrelevant to the issue of *support* of a filed petition, that statute neither prevented the charging

4. In the Appellate Court the various charging parties made motions for intervention which were denied by the Court. Neither the grounds upon which the motions were based nor those upon which the Court denied them are stated in the opinion. It is difficult, therefore, to determine the significance of this ruling, particularly since the thrust of the Court's discussion of the issue of charging parties' rights suggests that they should be accorded the status of "parties" in the District Court. It is most likely that the charging parties failed to argue that they constituted "parties" in the District Court; indeed appellants are aware of no case in which this argument, as supported in this Response, has been propounded to a Court for its consideration. To that extent, this appears to be a case of first impression. It is difficult to see, however, given the reasoning of the Court in *Retail Clerks*, how that Court could have avoided making such a finding had it been urged and supported.

parties' independent urging of an injunction in *Retail Clerks*, nor could it prevent Sears' appeal of the failure to grant an injunction here. In both cases, the charging parties' actions are in support of the petitions as originally filed by the Regional Director.

2. After disposing of the Board's arguments predicated upon Norris-LaGuardia, the Court turned its attention to further arguments based upon the scheme of the National Labor Relations Act. The fact that injunctive relief pursuant to Section 10(l) is ancillary to subsequent proceedings before the Board gives no support to the notion, urged by the Board both in *Retail Clerks* and here, that only the Board, through a Regional Director, may determine the extent or the length to which an injunctive remedy should be sought. The Court reminded the Board, in *Retail Clerks*, that:

> "Section 10(l) reflects a Congressional determination that the unfair labor practices enumerated therein are so disruptive of labor-management relations and threaten such danger of harm to the public that they should be enjoined *whenever a district court has been shown* reasonable cause to believe in their existence and finds that the threatened harm or disruption can best be avoided through an injunction. (Citations omitted.) It is not for the Regional Director to substitute his own ideas of how best to deal with alleged unfair practices for those of Congress." (Emphasis by the Court.)

By denying to the Regional Director the exclusive authority to determine whether to pursue or to persist in efforts to secure injunctive relief subsequent to the filing of his petition, the Court disposed of the primary conceptual objection which has been raised to Sears' appeal in this proceeding. Sears, therefore, has the right independently of the Regional Director to pursue the Congressional directive of persuading the District Court that it has been shown

reasonable cause to believe that 10(l) violations involved have occurred or to seek to persuade the Appellate Court that such proof was made.

In final support of its view, the Ninth Circuit suggested an analogy predicated upon the scheme of the National Labor Relations Act. Once the General Counsel of the Board has "embarked upon the judicial process" by instituting a complaint, he may not thereafter control the Board's consideration of the issues in the controversy. Similarly, once the Regional Director determines the existence of reasonable cause and files his injunction petition, he should not thereafter control the court's consideration of the issues raised in his petition. In both instances Congress' purpose is satisfied when the Board or its agents institute actions resulting from the application of its delegated exclusive authority. Thereafter, the charging parties' interests entitle them to an independent participatory role. It is a feasible and logical extension of the Court's analogy to conclude that just as charging parties' interests in Board proceedings are such as to entitle them to appeal adverse Board rulings to the appellate courts, so also should their interests in 10(l) proceedings in the District Courts entitle them to a similar appeal. In both cases, charging parties seek only to test the correctness of an adverse decision while they support the Board pleadings to which their original charges gave rise.

3. The third principal point made by the Ninth Circuit was in response to the contention of the Board, repeated in both Motions to dismiss in this case, that charging parties should not be permitted to secure injunctions because to do so would permit them to usurp the function of the Board as the custodian of the "public interest." In this view, the securing of an injunction under Section 10(l) is an act in the "public interest" not in aid of the private interests of charging parties.

The Court's answer was unambiguous:

> "However, even if we agreed with the Regional Director that it was the charging parties who had procured the injunction, we cannot conclude that this would necessarily have constituted reversible error. The strict dichotomy between public and private interests which the Regional Director espouses in his effort to limit the participation of private parties has been subjected to well deserved criticism."

The concept that parties who are victimized by violations of law are without a legally cognizable interest in the enforcement of that law on their own behalf has indeed been discredited. See 3 Davis, Administrative Law, § 22.13, at 273-75 (1958); Jaffe, *The Public Right Dogma*, 59 Harv. L. Rev. 720, 726 (1946) ("private and public interests are, both in a substantive and procedural sense, aspects of the totality of the legal order"); Comment, *The Charging Party Before The N. L. R. B.: A Private Right In The Public Interest*, 32 Univ. of Chi. L. Rev. 786 (1965).

4. The final principal point made by the Court in *Retail Clerks* is encompassed in the following quotation:

> "We agree, and find no inconsistency in allowing the 'public' interest to be represented by the 'private' charging parties when the representative of the NLRB is either unable or unwilling to do so."

This statement raises the issue of the options open to the charging party when the Regional Director fails to appeal an adverse decision of the District Court. Under such circumstances, in which "the NLRB is either unable or unwilling" to act, and in which the damage to the charging party which causes the injunction petition to be filed continues, there can be no sound and equitable basis for refusing to allow the charging party to appeal. This is true even if the charging party is not deemed to have "party" status in the court, but serves in the place of a party, the

Regional Director, who declines to protect the charging parties' interests.

B. The Scofield and Fafnir Cases:

These cases, decided approximately six months after *Retail Clerks*, offer support to Sears' position herein by analogy. The cases differ in that in the instant proceeding Sears contends it was conferred the status of a "party" in 10(l) cases by statute, whereas *Fafnir* concerned the successful charging parties' rights to intervene in proceedings to review and enforce Board orders.[5] *Fafnir* and

5. Should this Court reject Sears' contention that it is already a party in this proceeding, then Sears should be permitted to intervene here in order to prosecute this appeal. Since the Federal Rules of Appellate Procedure provide no fixed time limits for a Motion to Intervene, and the rules of this Court are silent on the question, there is no basis to depart from the established principle that the Federal rules should be liberally construed. *Clark v. Saiduska*, 205 F. 2d 915 (CA 7, 1953). Therefore, Sears' Notice of Appeal should be construed to constitute also its Motion to Intervene, as supported and amplified by its Docketing Statement filed in this Court. Such a construction would do substantial justice without causing surprise to any other party to the appeal.

There is ample precedent for such an order. Leave to intervene may be granted solely in order that the intervenor may prosecute an appeal. *Wolpe v. Poretsky*, 144 F. 2d 505 (CA 1, 1944), cert. den. 323 U. S. 777; *Turner v. Willard Fidelity & Gas Co. of N. Y.*, 157 F. Supp. 451 (DC, N. Y., 1957). Even absent a formal order granting intervention in the District Court, when the rights accorded to participants in the District Court are similar to those exercised by parties (as they were accorded to Sears via 10(l)), then such participants have standing to appeal as if they were, or had been made parties. *Smartt v. Coca-Cola Bottling Corp.*, 337 F. 2d 950 (CA 6, 1964), cert. den. 380 U. S. 934.

Finally, a motion of a person to intervene as a party appellant, although not a party in the District Court, should not be denied if sufficient reasons can be shown for allowing appellate intervention. *McKenna v. Pan Am Petroleum Corp.*, 303 F. 2d 778 (CA 5, 1962). In the instant proceeding such "sufficient reasons" are readily shown: Sears' damage by alleged unlawful acts was the basis of the suit in the District Court; the damage continues; a Trial Examiner's decision has confirmed that such damage was in fact the result of unlawful acts; the remedy Sears seeks by pros-

Scofield involved intervention rights rather than party status since, unlike the instance of 10(l), the statute was silent on the question of the right of successful parties before the Board to participate in court proceedings. Despite this difference, *Scofield* and *Fatnir* (hereinafter called *Scofield* for brevity) are relevant to the instant appeal since the reasons and supporting logic they provide for permitting intervention both support the right to appeal in this case and answer objections to permitting such an appeal which have been made by the Regional Director.

1. The Court's rationale for its holding favors not merely intervention but also appeal where the language of the statute may be reasonably susceptible of an interpretation permitting it.

> "The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review . . .
>
> "The purpose of the judicial review is consonant with that of the administrative proceeding itself—to secure a just result with a minimum of technical requirements . . ."

Indeed, the Court quotes with approval the conclusion of the report of the Advisory Panel on Labor Management Relations Law, S. Doc. No. 81, 86th Cong., 2d Sess. (1960), which contained a statement favoring the fullest appellate participation even for those who could not claim to be there of right:

> ". . . any party to N. L. R. B. proceedings should be allowed to intervene in the appellate proceedings. . . ." Page 17.

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ecuting this appeal is precisely that which the statute provides where such unlawful acts continue; the Regional Director has declined to appeal the District Court's refusal to grant this remedy; unless intervention is granted Sears will be unable to stop the continuing irreparable damage inflicted by the continuing unlawful conduct.

2. Further, the Court's belief in the *need* for intervention for successful charging parties in appellate courts applies equally to the need for appellate rights in Section 10(1) cases.

> "In fact, the Labor Board itself agrees that intervention by charged parties will not impair effective discharge of its duties and may well promote the public interest. The rights typically secured to an intervenor in a reviewing court—to participate in designating the record, to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, to petition for rehearing in the appellate court or to this Court for certiorari—are neither productive of delay nor do they cause complications in the appellate courts. Appellate records in Labor Board cases are generally complete, and whatever material the charged party may see fit to add to the appendix will not affect the burden in preparation. Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful . . . Participation in oral argument does not necessarily enlarge the total time allocated, since parties aligned on the same side are usually required to share the time.
>
> "On the other hand, an *amicus*—with the exception of the right to file a brief—might be unable adequately to present all the relevant data to the court."

3. To the extent that courts have relied on the concept that charging parties' direct involvment in Board-related proceedings is barred by the "public interest" nature of such proceedings, the Supreme Court disposes of that bar, citing *Retail Clerks, supra:*

> "In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme. These cases have, to be sure, emphasized the 'public interest' factor. To employ the rhetoric of 'public interests', however, is

not to imply that the public right excludes recognition of parochial private interests.

"In short, we think that the statutory pattern of the Labor Act does not dichotomize 'public' as opposed to 'private' interests. Rather the two interblend in the intricate statutory scheme.

"While it is true that the Labor Board does not confer a private administrative remedy, it is equally true that, since 1947, it serves substantially as an organ for adjudicating private disputes."

4. To those who would argue that either intervention or the right of charging parties to appeal in Section 10(l) proceedings would increase courts' burden, the Supreme Court provides a rebuttal:

". . . the need for centralized control over the agency hearings and the standards under which they operate is much greater at the administrative than the appellate level, where perforce an adequate record has been made for adjudication."

5. Throughout the decisions which the Board has cited in opposition to intervention in 10(l) cases, emphasis has been placed on the fact only the Board may inititate injunction proceedings. Such discussions have confused the right to initiate with the right to intervene after initiation. In *Scofield*, the Supreme Court addressed itself to this distinction in a manner which clearly favored intervention:

"We find nothing inconsistent in denying the right of a private party to istitute a contempt proceeding—where the Board's expertness in achieving compliance with orders is challenged—and on the other hand, in permitting intervention in a proceeding already in the court for decision."

It seems clear that when a charging party is already accorded the status of a "party" in the District Court, the same reasoning would permit it to appeal or to take any

other independent action not inconsistent with the provisions of the Board's petition.

6. Finally, the Court stated its belief that intervention of right by charging parties should be permitted in the appellate courts by analogy with the provisions of the Judicial Review Act, 5 U. S. C. § 1038:

> ". . . any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside or suspended, *may appear as parties thereto on their own motion and as of right and be represented by counsel* . . ." (Emphasis added).

and by analogy to Rule 24(a) (2) of the Federal Rules of Civil Procedure:

> "*Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

In general, *Scofield* argues for maximum participation by charging parties in the appellate court proceedings which result from charges they had originally filed with the Board. And in the analogies the Court considers relevant to the statutes set out immediately above, the Court concedes its belief that the interests of charging parties in the appellate litigation of their cases entitle them to the status of parties in those proceedings.

In arguing the irrelevance of *Scofield* to the instant case, the Board emphasizes the fact that *Scofield* dealt with the review or enforcement of final orders under Sections 10(e) and (f) rather than the securing of temporary injunctive relief under Section 10(l). The Board's attempted distinction is without merit. First, *Scofield* argued in terms of

general truths concerning the right to be heard effectively. This does not depend upon whether the hearing is on a request for permanent or temporary relief. Second, Section 10(h) of the National Labor Relations Act exempts from the Norris-LaGuardia Act all federal court proceedings authorized under Section 10, including 10(e), (f), (j) and (l), so that no distinction between the nature of the relief sought can be attributed to the operation of Norris-La Guardia. Third, the basis for permitting charging parties to participate in proceedings under 10(e) and (f) apply equally to 10(l), *i.e.*, to prevent harm to the charging party through an adverse decision to which the charging party was not a full and effective participant. Damage to an employer who is unable to secure an injunction of an illegal strike is no less than damage he may suffer as a consequence of a final order of the Board. Surely, speculation as to the difference, if any, in the quantum of damage to be suffered cannot serve as the basis for denying the right to the fullest possible participation by the charging party.

It follows, therefore, that the logic of *Scofield* applies as well to cases under Section 10(l).

IV. The Authorities Cited by the Union and the Regional Director.

In general, these authorities fall into one of two categories; they are irrelevant to this appeal or they rely upon superceded or incorrect principles. Illustrative of the first group are cases such as *Meekins v. Boire*, 320 U. S. 445 (CA 5, 1963); *Dunn v. Retail Clerks*, 307 F. 2d 285 (CA 6, 1962); *Shore v. Building and Construction Trades*, 50 LRRM 2139 (W. D. Pa., 1962); *ILU v. Sunset Line & Twine*, 77 F. Supp. 119 (D. C. Calif., 1948); *Amazon Cotton Mills v. Textile Workers Union*, 167 F. 2d 183 (CA 4, 1948) and *Bakery Sales Drivers Local Union v. Wagshal*, 333 U. S.

437 (1948). In each of these cases, a private party had filed a petition for an injunction independently of any Board action. And each case stands for the proposition that a private party may not *institute* suits for injunction, that only the Board, through its Regional Directors, may do so. This priciple is not in dispute and does not require such extensive citation. More significantly, these cases do not address themselves to the distinction between *initiating* injunction suits and *supporting* such petitions subsequent to their filing. There is no dispute in this proceeding that the injunction petition had been filed by the Regional Director. The question of the extent to which charging parties may thereafter support the granting of an injunction, and in which courts they may do so, is discussed instead in *Retail Clerks* and *Scofield*, *supra*. None of the precedents cited by the Union or the Regional Director, such as are referred to above, constitute any basis or support for a dismissal of Sears' appeal.

Illustrative of the second category is *Phillips* v. *United Mine Workers, District 19*, 218 F. Supp. 103 (E. D. Tenn., 1963), which includes the major points made in the remaining authorities cited in the Motions to dismiss this appeal.

In *Phillips*, the Board and the respondent union moved jointly to dissolve an injunction. The employer sought to intervene and oppose the dissolution; he did not argue that he enjoyed the status of a party in the District Court but contended instead for permissive intervention. On its facts, therefore, this case is strongly analogous to *Retail Clerks*, *supra*. The District Court denied the employer's motion to intervene on three grounds:

1. The congressional policy to prohibit the issuance of injunctions upon the application of private parties would be thwarted if private litigants could "take over, control and conduct litigation initiated by the National Labor Relations Board."

2. Suits under Section 10(l) are in the public interest and do not merely vindicate private rights.

3. When the language of Section 10(l) states that a charging party may present "relevant testimony", it means only that, and a charging party does not thereby acquire full rights of intervention; otherwise the Board would lose the authority to control the Government's (*i.e.*, public) interests.

In the light of all which has already been said, it must follow that the Court's arguments no longer have any validity, if they ever did. Reliance upon the distinction between "public" and "private" rights and interests can no longer be supported. The same is true of the Court's failure to distinguish between institution of a petition and its support. The Court's fear of a "take over" by the charging party is totally unwarranted since, as *Retail Clerks* made clear, the charging party is limited to the allegations of the Regional Director's petition and theories and relief which are consistent therewith. In addition, the Court's effort to limit the participation of charging parties is in conflict with the decisions and arguments in *Retail Clerks* and *Scofield* which were discussed above. Finally, the Court's assertion, without citation or discussion, that the words of Section 10(l) mean only what they say, is an evasion; the Court failed to consider the legislative history which gave rise to those words; failed to consider the distinction in language between Sections 10(j) and (l) and the implications of those differences; failed to evaluate the consequences of similar "words" which create the status of "parties" in Board proceedings, and in general, failed to offer an analysis of these matters in lieu of asserting inappropriate and dated maxims.

By way of concluding this discussion of the authorities cited in the Motions to dismiss this appeal, it is appropriate to note two additional matters. The first is the Regional

Director's statement of belief that intervention has never been granted to charging parties in 10(l) cases where issue has been joined on that point. It is sufficient to cite, in response, two such cases in which charging parties sought intervention as a matter of right, although they unfortunately failed to take the next step of urging their status as "parties", and in which intervention was granted over opposition. *David* v. *Hotel and Restaurant and Bartender's International Union, Local 248*, No. 66-68[8] (D. C., Okla., 1966) (unreported but described in the Thirty-First Annual Report of the National Labor Relations Board at 155-6), and *Penello* v. *Plumbers Local Union No. 5*, 41 LRRM 2269 (D. C., Va., 1957), in which the Court held:

> "Section 10(l) of the Act plainly authorizes participation by the charging party. Intervention is necessary to implement this right." (Citations omitted.)

See also, *McLeod* v. *General Electric Co.*, 366 F. 2d 847 (CA 2, 1966).

The second matter relates to the citation, in both Motions, of *Reynolds* v. *Marlene Industries Corp.*, 250 F. Supp. 722 (S. D., N. Y., 1966). That case involved a charging party's motion to intervene in a proceeding under Section 10(j) of the Act. The Court denied this motion on the grounds (i) that the presence of the Board's counsel was adequate for the representation of the movant's interests; (ii) that the statute gave no right to intervene; and (iii) that *Scofield* did not require the permitting of intervention since *Scofield* was concerned with the possibility of multiplicity of suits not present in *Reynolds*. This case is entitled to no reliance in the instant matter. First, the failure of the Regional Director to appeal the District Court's adverse decision obviously prevents the Board's representation from being viewed as "adequate" in the Appellate Court; second, the rights guaranteed charging parties in 10(j) are not the same as those guaranteed in 10(j), as has been discussed at

length above; and third, for the *Reynolds* Court to construe the discussion in *Scofield* of charging parties' rights to be limited to a concern over multiplicity of suits constitutes an irretrivably erroneous view of the Supreme Court's desire to expand the participation of charging parties in suits involving their vital interests.

V. The Expanding Awareness of the Role of Charging Parties.

The Ninth Circuit's decision in *Retail Clerks* represented an effort to move the discussion of charging parties' rights from the level of cliche to that of an awareness of their legitimate right to participate in proceedings governing their essential interests.

Scofield represented further movement in that direction as that Court acknowledged for the first time the right of successful charging parties to continue to represent their interests in appellate proceedings. In the course of doing so, the Supreme Court acknowledged the irrelevance of doctrines which had limited charging parties' participation since the early days of the National Labor Relations Act, such as the concept that the statute recognized and enforced only "public" rights.

Other courts have participated in this movement. In *Leeds and Northrup v. N. L. R. B.*, 357 F. 2d 827 (C.A. 3, 1966), the Third Circuit overturned a long-standing Board practice by declaring that charging parties were entitled to an evidentiary hearing on their objections to unilateral settlement agreements which the Board in its allegedly unreviewable discretion had regularly taken over the charging parties' futile objections. Henceforward, ruled that Court, charging parties were entitled to a record upon which they could seek appellate review.

Even the Board has recognized this development as, for

example, in *Spector Freight*, 141 NLRB 1110 (1963), in which it acceded to a greater role by the charging party in examining witnesses in Board hearings.

In light of this evidences of the current of the law, the instant Motions to dismiss Sears' appeal represent efforts to return to limiting and formalistic doctrines which have been increasingly discarded by our courts.

VI. Conclusion.

For the reasons argued and in reliance on the authorities discussed herein, Sears respectfully urges this Court to dismiss the Motions of the Union and the Regional Director to dismiss its appeal.

D. L. Graconmi,
Donald L. Graconmi,
2910 Security Life Building,
Denver, Colorado 80202.

Kalvis M. Grove,
Kalvis M. Grove,
111 West Washington Street,
Chicago, Illinois 60602,

Gerald C. Sinetana,
Gerald C. Sinetana,
925 South Homan Avenue,
Chicago, Illinois,

Attorneys for Sears, Roebuck and Co., Appellant

[Affidavit of service omitted in printing.]

TXD-(SF)-13-69
Denver, Colo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Trial Examiners
Branch Office
San Francisco, California

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, and SEARS ROEBUCK AND CO.	Case No. 27-CC-278.

Mr. Richard J. Wise, Denver, Colo., for the General Counsel.
Mr. Philip Hornbein, Jr., Denver, Colo., for Respondent Union.
Lederer, Barnhill and Fox, by Mr. Kalvin M. Grove, Chicago, Ill., for Complainant Company.

DECISION OF THE TRIAL EXAMINER.

STATEMENT OF THE CASE.

Maurice M. Miller, Trial Examiner: Upon a charge filed and duly served, the General Counsel of the National Labor Relations Board caused a Complaint and Notice of Hearing to be issued and served upon the parties herein.

(The Complainant, Sears, Roebuck and Co. had filed the charge on August 9, 1968; General Counsel's Complaint issued August 29th. All dates cited within this decision refer to 1968, unless otherwise noted.)

Therein, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, designated as Respondent Union herein, was charged with the commission of certain unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519. Copies of the Complaint and Notice of Hearing were duly served upon the respondent labor organization. Within Respondent Union's duly filed answer, certain factual statements in General Counsel's Complaint are conceded; Respondent Union, however, denies the commission of unfair labor practices.

Pursuant to notice, a hearing with respect to the issues was held at Denver, Colorado, between October 8th and October 11th, before me. The General Counsel, Respondent Union, and Complainant were represented by counsel. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues.

One day before the hearing closed, Respondent Union's counsel requested a subpoena for General Counsel's witness, Massey, who had previously been excused following the completion of his testimony; counsel then proposed his recall as Respondent Union's witness. While testifying first, in General Counsel's behalf, Massey had proffered certain testimony which a subsequent witness for General Counsel, Harris, partially contradicted. Respondent Union's counsel contended that Massey's further testimony with respect to the particular matters involved thus in contradiction, regardless of whether he maintained a disagreement with General Counsel's subsequent witness or resolved their clearly discrepant testimonial recollections, would be both relevant and material. The following day, when the parties' testimonial pre-

entations were, in all other respects, complete—the witness sought by Respondent Union's counsel had, presumptively, not been served: he did not present himself when called. Respondent Union's counsel, then, requested that the record be kept open and the hearing continued, so that Massey's further testimony, regarding the discrepancy between Harris' recollection and his, could be received at some later date. Following a record colloquy, I concluded that such further testimony depending upon its conceivable tenor would either be immaterial or merely cumulative. Counsel's request that the record be kept open and the hearing continued, therefore, was denied. Upon further consideration, I remain persuaded still, that this disposition of counsel's request has worked no prejudice, with respect to Respondent Union's defensive presentation. *N.L.R.B. v. Phoenix Instrument and Electronic Specialties*, 244 F. 2d 853, 59 LRRM 2175, 2178 (C.A. 9). My ruling is reaffirmed.

Since the hearing's close, comprehensive and well prepared briefs have been received from counsel for the General Counsel and Complainant; these have been duly considered.

Findings of Fact

Upon the entire testimonial record, documentary and film evidence received, and my observation of the witnesses, I make the following findings of fact:

I. Jurisdiction.

Sears, a New York corporation, maintains several related mercantile establishments both within and near Denver, Colorado, at five locations. Three of these are retail stores.

(Customarily, these are designated as the Cherry Creek store, Westland store, and Northglenn store, respectively.)

The firm, likewise, maintains a warehouse, with a separate catalogue service location. Respondent Union's course of conduct, challenged herein as violative of the statute, affected Complainant's Cherry Creek store and warehouse merely.

In the course and conduct of its business operations, Sears has sold and distributed—through its Cherry Creek store specifically—goods and products value in excess of $500,000 yearly. Likewise, Sears has purchased, transferred and delivered to its designated store, and warehouse, goods and materials, valued in excess of $50,000 yearly, which goods and materials were transported to Complainant's store and warehouse directly from states of the United States other than the State of Colorado.

Upon these facts, which are conceded to be correct, I find that Complainant is now, and has been throughout the period with which this case is concerned, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the statute. With due regard for those jurisdictional standards which the Board presently applies—see *Siemons Mailing Service*, 122 NLRB 81, 43 LRRM 1056, and related cases, I find assertion of the Board's jurisdiction in this case warranted and necessary to effectuate statutory objectives.

II. The Respondent Union.

Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, designated as Respondent Union within this decision, is concededly a labor organization within the meaning of Section 2(5) of the Act, as amended. Throughout the period with which this case is concerned, I find, George Cooney, Respondent Union's financial secretary and business manager, together with Paul Wishard and Richard Geisler, field representa-

tives, have been agents of the designated respondent, functioning on its behalf, within the meaning of Section 2(13) of the Act, as amended.

III. The Unfair Labor Practices.

A. *Issues.*

In connection with Sears' general mercantile operations, the firm sells floor coverings at retail. The floor coverings sold compass soft surface (carpet), together with hard surface (linoleum and tile), materials. In most cases, the firm sells not only the floor covering materials but likewise, whatever installation services may be required. The customer pays a single price, calculated to cover Sears' selling price for necessary materials purchased together with a labor selling price, plus any charges related to credit terms which the particular customer may request or require. Whenever Sears' floor covering sales compass installation work, responsible Sears representatives finally "assign" such work to various floor covering installers, under circumstances which will be noted.

This case derives from a series of picket line confrontations between representatives of Respondent Union, on the one hand, and, on the other, Joe Brase and Eddie Stimac, doing business as Joe and Eddie's Carpet Service Company, together with Sears, through its Cherry Creek store and warehouse specifically. Thereby, so General Counsel contends, the Respondent Union, through its representatives, induced and encouraged various Sears employees—together with individuals working for other persons engaged in commerce—to cease performing services for their respective employers. Further, General Counsel contends that Respondent Union likewise threatened, coerced, and restrained Sears, together with other persons engaged in commerce. Such conduct was undertaken so General

Counsel herein charges—with the unlawful object, in each case, of forcing or requiring Sears to cease doing business with Joe and Eddie's Carpet Service, and certain other floor covering installers variously designated. Respondent Union denies the statutory violations charged. Further, Respondent Union contends, affirmatively, that all floor covering installers working on Sears' jobs function as company workmen; that Sears fixes and controls their wages and working conditions; that those wages and working conditions are inferior to those generally prevailing throughout the floor covering industry within the Denver metropolitan area; that such wages and working conditions, therefore, jeopardize the prevailing standards for wages, hours, and working conditions set through collective bargaining for Respondent Union's members; that Respondent Union thus has a so-called primary labor dispute with Sears concerning the wages, hours, and working conditions which Complainant has fixed for floor covering installation workers; that Sears is not a neutral or disinterested party with respect to that dispute; and that Respondent Union's conduct, challenged herein as violative of law, should, therefore, be considered protected and concerted activity, on both statutory and constitutional grounds.

B. *Facts.*

1. Preliminary Statement.

How Floor Covering Is Sold.

At Sears' metropolitan Denver area stores, the specific department or division which handles floor covering sales is known as Division 37; such department or divisions are maintained at the Cherry Creek, Westland, and Northglenn stores.

Generally, prospective customers visit the floor covering department of some Sears store; there, they may

discuss with a salesman—preliminary—the type of floor covering they presumptively desire to purchase. The salesman, usually, tries to arrange a visit within the customer's home; when successful, he brings samples calculated to help the customer select whatever floor covering he may desire. Should the customer indicate that a complete job, with installation service, is desired, the salesman will prepare a Floor Covering Estimate and Proposal document; having seen the specific floor area or areas which the customer wishes covered, the salesman will calculate both the price of the carpet or hard surface covering materials required, and estimated material installation charges. Both figures will be noted, within appropriate spaces, on Complainant's Estimate and Proposal form.

(Six copies of the proposal are normally prepared. The copy titles vary from one copy to another; they correspond with the first copy, however, in most major respects.)

When the customer accepts his so-called "bid" proposal for both materials and labor, the salesman will normally draw a diagram of the space or spaces to be covered, within a graph marked section which the firm's Estimate and Proposal form provides. This drawing will show the rooms to be covered, the type of material required, and sometimes where seams should be sewn or laid.

Following the document's preparation—when a final consensus with the customer regarding various details, such as credit terms, has been reached—the complete Estimate and Proposal is signed, in multiple copies, by the parties. The salesman then returns the document, minus the customer's copy—together with a sales check—to Sear's store. The reverse side of the customer's retained copy of the proposal form—so the record shows—contains the following language:

> INSTALLATION. It is understood that Sears will not install said materials but that by the acceptance of this proposal you authorize Sears to arrange with a contractor licensed where required to make the installation; you authorize Sears (1) to issue to said contractor an installation work order with these specifications, (2) to inspect the installation upon completion thereof, and (3) to pay the contractor his charge for such installation upon your execution of a completion certificate establishing that the installation has been satisfactorily completed. You agree to pay to Sears the amount specified herein which will cover the price of said materials and the installation charges.

When the customer has proposed a credit purchase, the complete Estimate and Proposal is submitted to Sears' credit department for review. Likewise—whether or not credit terms must be approved—the proposal is submitted to the proper Division Manager; the latter, then, checks the document's correctness.

When the particular Estimate and Proposal has received the Division Manager's concurrence, the necessary document copies (Nos. 1, 2, 3, and 4 copies) are placed in a job folder, which is normally sent to Sears' warehouse installation department, or some particular store's customer service department, for further processing.

> (With respect to hard surface floor coverings—linoleum and tile—such processing is centralized at Sears' warehouse, under Installation Manager Donald Chandler's supervision. Chandler is responsible, likewise, for the processing of carpet installation orders received from Sears' Cherry Creek store. Sears' other store Division Managers, McNally at Westland and McGuire at Northglenn, are responsible for processing carpet installation orders which originate at their stores.)

The store salesman, generally next places an order for whatever materials may be required. Carpet is procured,

generally, from direct sources—that is, the carpet mills—or from Sears' pool stock warehouses. Linoleum and tile are normally carried in stock at the warehouse.

Following a sale's conclusion, the salesman generally gives the customer an approximate period within which the materials may be expected, and notes "three or four days thereafter" as the customer's estimated installation date. Normally, when the goods required have been made available either from Sears' warehouse or from some direct source—whether hard surface or soft surface materials are involved—the job folder concerned with the particular sale will be removed from a file for further handling, by a representative in Sears' warehouse, or store customer service department.

> (For present purposes, this description of Sears procedures, related to handling floor covering job orders, will be rather generalized. The process will be detailed further, *infra*, when the nature of the relationship between the Complainant and various floor covering installers must be reviewed.)

Sears' installation department or customer service representative, first, communicates with the designated customer, to determine the best, most appropriate time for material installation, consistent with both the customer's needs and the projected availability of required installers. When this determination has been made, the necessary installation work is assigned to some particular installer. Requisite copies of Sears' job documents—designated "General Order to the Contractor" specifically—are replaced in the job folder which the installer will subsequently procure; these folders are, then, placed within properly designated boxes or slots, depending on the store, for each installer's subsequent pickup.

(The Complainant maintains current working relation-

ships with some sixty installers; this number includes those who perform floor covering work. At Sears' warehouse, each of them has a pigeonhole within which their particular job orders are placed. At Westland, such job orders are made available within the store's customer service department.)

Most installers, generally visit the warehouse or particular store within which they do business, daily; at such times, they will customarily pick up their work orders. They then procure the material required for the job which they will be required to perform on any given day, proceed to the jobsite, and perform whatever work may be required.

When their particular jobs are completed, the installers concerned—pursuant to their more or less regular practice—submit one copy of Complainant's relevant Estimate and Proposal, together with their conventional Invoice form, for payment.

Hard surface floor covering—linoleum and tile—which Sears sells is normally installed by Frank Harris, doing business as Frank Harris Tile Company, and by Daryl Massey, doing business as Duke's Floor Covering; other linoleum and tile installers who sometimes receive work from Complainant herein, however, include Joseph Mozzicato, John Erpelding, doing business as Sea-Ro Tile Company, and Gerald Fallert, doing business as G. & H. Tile Company. Soft surface floor covering sold from Sears' Westland store has been installed by Joe and Eddie's Carpet Service Company. Before Respondent Union commenced the picketing with which this case is concerned, soft surface coverings sold through Cherry Creek were installed by Crown Carpet Service; since Respondent Union began picketing, however, Cherry Creek installations have been handled by Joe and Eddie's and by Paul E. Clark, d/b/a Clark Carpet Service. So far as the record shows,

without contradiction, reveals some variant practices in this connection. Sears has established no fixed reporting requirements; floor covering installers are not *required* to report at specific times, or even at all. Thus, with respect to Joe and Eddie's Carpet Service particularly, the record reveals: That the partners generally visit Sears' Westland Store daily, Mondays excepted, that, sometimes, they may perform work for other customers first, and then visit Complainant's store; that they do not, therefore, report at particular times; that they normally work about eight hours per day; that they do not themselves, receive overtime compensation from Sears or other customers should they work more than eight hours; but that they pay their own workmen overtime. Virgil Massey's comparable testimony, which stands without contradiction, warrants determinations: That he tries to pick up all of his assignments on Monday, for the coming week, that he normally works, thereafter, about thirty hours per week (on *all* his work), making some $10 per hour; that, when he does perform Sears' work, he normally stops to pick up his required materials between 8:30 and 9:00 o'clock, drinks coffee until 9:30 or 10:00 o'clock, then goes to work; that there are days when he performs Sears' work on which he has no contact with persons at Sears' premises.

None of the floor covering installers punch a time clock. So far as the record shows, should one not wish to work, he thereby incurs no duty.

[illegible] testified, works for Sears between 25-30 hours per week, he averages $80 per day for each day's work. He does not feel required to visit Sears daily; when he does so, he usually reaches the warehouse at 9:30 a.m. approximately.

procure the materials required for their installations. Such materials are procured directly, either at Sears' store dock or warehouse; the Complainant does not deliver floor covering, neither to the customer's jobsite or residence, nor to contractors. With respect to floor covering materials pickups, further, the record shows that Joe and Eddie locate, pick up and load their own materials at Sears' dock. They will sometimes pick up several days' work at one time; materials thus procured may be stored in their garages, or left on their truck. They have left Sears' material in their garages, sometimes, for a couple of weeks.

(When supplied by Sears, neither hard surface materials nor carpet materials are pre-cut or pre-sewn in any fashion. Carpet materials are received by these installation contractors in rolls which approximate the correct square yardage required for the particular job. All cutting and sewing is done within the customer's home.)

Sears does not supply any material to carpet layers save the carpet and pad materials which Complainant sells. When linoleum or tile is sold, Sears likewise sells the paste and metal fixtures required for installation; the hard surface material layer, however, supplies any required underlayment or base.

Sears' job tenders do not take into account such factors as where the material layers live; assignments are made on the basis of the installer's availability.

In that connection, further, the record shows that Joe and Eddie's Carpet Service does not work for Sears on Mondays, then works Tuesday through Friday each week. Comparably, Massey only works three days per week for

the present record have other customers within the Denver metropolitan area. Their charges may vary, as between customers, depending on their work. They can and do schedule significant amounts of work for their other customers on the same days they do Sears' work. When this is done, they may handle their several jobs in any order they choose, and need not perform Sears' work first. However, should a Sears' customer be promised some particular time of day for his work, the installers will *try* to meet that commitment.)

Normally, the person or department responsible for Sears' job tenders—with regard to floor covering installation work—takes into account whatever work load limitations particular installers may have set. Stating the matter otherwise, these installers are tendered jobs, daily, which will not exceed their own, previously stated, limitations. Thus, Joe and Eddie's Carpet Service, normally will be given jobs which require them to lay no more than roughly 100-150 yards per day. Massey and Harris—within the field of hard surface floor coverings—do about $60 worth of work per day; this normally represents about five-six hours of work. Joe and Eddie have, sometimes, further limited the amount of work which they will perform on a given day by telling the Sears' representative responsible for assignments to schedule only so much, or not to schedule any more jobs for that day than she already has. Sears —as far as the record shows—complies. Additionally, Joe and Eddie may determine, themselves, which of them will perform particular jobs tendered.

d. *How the Work Is Performed.*

When floor covering materials have been procured, the contractor concerned may proceed to the customer's home, or call the customer to arrange a time which is convenient

for him. He may likewise take the material home and leave it there, until he is ready to perform the work. Sears does not tell installers what customer to visit first, how early to arrive, or how late to stay; nor are directions given as to how the customer's home may be reached. The record shows—in this connection—that Joe and Eddie may, sometimes call Sears' customers and reschedule work with them, without notice to Complainant's store or warehouse. Likewise, they may make independent arrangements to come back to a customer's house the following day, should they be unable to reach a job or complete a job within a single day—all of this without notice to Sears' customer service or installation departments.

Massey, seemingly, follows a different procedure. Whenever he cannot reach a particular Sears' customer's job, he will call Sears and advise them, directly, regarding the job's postponement.

Installers receive no directions from Sears with regard to how floor coverings should be installed. They receive nothing more, with regard to particular jobs, than the salesman's rough drawn delineation of the specific room or living area within the customer's home to be covered.

> (The salesman's prepared Estimate and Proposal form may or may not have such a diagram. In any event, whatever diagram there may be is not drawn to scale. Rather than a specific direction to installers, with regard to how floor covering should be laid, it seemingly does little more than help the salesman in consummating the sale.)

Sometimes, with respect to carpet installations, the diagram will show where seams are to be located; carpet layers, however, are not required to follow the drawing. They often ignore it, and put seams elsewhere, when, within their judgment, that would make for a better job. They

may also modify the specified job in various other respects. When this is done—so far as Joe and Eddie is concerned—no notice is given Complainant herein, nor is prior clearance requested.

Though the contracts between Sears and various floor covering craftsmen require the latter to refrain from doing extra work for Sears' customers—such as taking up old carpet and relaying it within another room—without written authorization, the practice of most installers is clearly contrary. Joe Brase testified regarding two such instances, for which the customer paid directly; his testimony was corroborated, generally, by his partner.

> (Massey, when queried in this connection, testified that he tells the customer to call a Sears salesman, because the customer is usually looking for a cut rate.)

Harris, so his testimony shows, does such extra work occasionally; sometimes he even sells the customer material for such extra work from his own stock. Paul Clark—though he has only worked for Sears since August 1968, has performed work for Sears customers, beyond that specified on Sears' job proposal, three times. Sears, so far as the record shows, gets no notice, and takes no reprisals in such situations; nor has it promulgated a flat prohibition.

Upon occasion, when busy, Joe and Eddie's Carpet Service has subcontracted Sears work to another person; this, without Sears' prior knowledge. That person has been paid with partnership funds. Harris, likewise, has had Massey perform Sears' work when he has been unable to do so. Complainant, on this occasion, likewise received no notice; Harris sent in the bill, and thereafter paid Massey himself. Harris has, likewise, negotiated directly with a Sears' customer for installation work, when the customer had made no arrangements with Sears, when his material was purchased, for such work.

Floor covering installers are responsible for repairing—without further charge—any of their work which may prove defective; likewise, they are responsible for any damage they may do. Should they be notified regarding a customer's complaint with respect to their work, however, they may normally schedule the required repairs at their convenience.

(Sears' current contract form grants the firm the right to condition payment of the contractor's installation charge "upon inspection by and approval of Sears that the job has been satisfactorily and properly completed" consistently with the salesman's Estimate and Proposal form. So far as the record shows, however, Sears' right of inspection is seldom exercised. Whether a complaint requires inspection will be determined as a matter of business judgment. Defective work, normally, will be brought to the craftsman's attention through customer complaints, which may be made either through Sears, which relays them, or directly.)

Massey, so his testimony shows, tries to get any necessary repair work done within a couple of weeks; Joe and Eddie's Carpet Service try to get theirs done sooner. Should installers be called upon to perform repairs on someone else's work, or to replace defective materials, they charge their regular prices. For such supplementary work, however, prices are not pre-determined. Massey, so his testimony shows, charges prices which he, himself, fixes for repair or replacement jobs; he has never had a bill rejected under such circumstances.

Floor covering installers have the contractual right to reject any work which Sears has tendered; they have, upon numerous occasions, exercised that right following their first visit to the prospective customer's home. Such rejections may derive from various considerations; these may

compass the craftsman's belief that the job cannot be performed properly as described within the firm's Estimate and Proposal form, or his belief that he cannot make money on the job. Thus, for example: Joe Brase testified—with general corroboration—that he refused a particular job in May, 1968, because he did not feel that the way the customer and the Sears' salesmen wanted the job performed was the proper way. His testimony shows that he left the job, and that he returned only after the customer had called Sears and concurred with Brase's recommendation regarding the way the work should be done. Clark—so the record shows—has rejected Sears' work twice since August 14, 1968. Massey, likewise testified that he had rejected work several times. Stimac's testimony reveals a rejection, with respect to part of a proffered job, because he did not believe he could do a good job, consistently with Sears' specifications.

e. *How Installers Are Paid.*

When Sears has—within the recent past—undertaken to establish a working relationship with some particular floor covering installer, Complainant's warehouse installation department manager, or some appropriate person within Sears' Denver managerial hierarchy, has negotiated with that "contractor" regarding a so-called price list which details the prices to be charged and paid for installation work. General Counsel, within his brief, notes—correctly—that, within the present record, there was much divergent testimony concerning the precise way various prices *charged to Sears* by different installers originated. However, that testimony—within my view—need not be recapitulated in detail. By way of summary, I find merit in General Counsel's comment, within his brief, with respect thereto:

The critical thread which runs throughout the testi-

mony of those involved in the determination of the price lists is this—the greater portion of the prices currently in effect were proposed and initiated by the installers. Further, in those stituations where prices were initiated by Sears, the installers involved engaged in meaningful negotiation as to the prices.

For example, Paul Clark's testimony shows that he initiated his first contract with Sears, seeking installation work. Clark, when he discussed the possibility of procuring installation work with Chandler, Sears' warehouse installation department manager, proposed or "bid" certain prices for various types of work which were acceptable to the latter. The prospective contractor, likewise told Chandler that he felt his proposed prices would subsequently have to be revised upward; Chandler, so I find, concurred.

Massey and Harris, so the record shows, together presented a revised price list, sometime early during 1968; they sought Chandler's concurrence regarding a proposed increase in the various rates which they were being paid. Their testimony, regarding the precise form of the list which they presented, was contradictory. However, my record review has persuaded me that regardless of the form which their proposal may have taken, these hard surface floor covering craftsmen themselves initiated the suggestions which Chandler subsequently accepted, save for certain fixture moving charges.

Testimony which Division Manager McNally, Brase and Stimac proffered, likewise, supports such a determination, relative to their negotiations. I find that Brase and Stimac, too, were initiators with respect to prices.

With respect to certain recent 1967 negotiations between the Crown Carpet Company, and another carpet laying contracfor with whom Sears no longer deals, on the one hand, and Sears, Area Group Manager Donald Jansen, on the other, the record does show that Jansen, rather than

the designated installers, was responsible for broaching discussions looking toward a change to *lower* base "per square yard" prices. However, the craftsmen—so I find—presented a written counter-proposal, nevertheless, for further price modifications calculated to cover "special" contingencies, which, within their view, would more precisely and equitably reflect the complexity of some of the work which they were doing; with respect to these installer proposals, as well as Sears' lower base price proposal, consensus was finally reached.

The price lists drafted, pursuant to these negotiations, consistently set different rates of installers' compensation (Sears' cost) for various types of work—which may present varying degrees of difficulty and require varying degrees of skill.

> (The record, further, warrants a determination that—despite these negotiated prices—situations may still develop with respect to which new negotiations are required, because previously set price lists may not cover some specific contingency or because the installers may *refuse* to perform work, judged to be more complex and difficult, for previously negotiated prices.)

These price lists provide the basis for those installation charges which may be noted on Sear's Floor Covering Estimate and Proposal forms; store salesmen compute their customers' installation charges from price lists which, in turn, derive from the prices which installers charge the Complainant herein. When Sears' customer service representatives or warehouse installation department personnel can readily compute—from their salesman's Estimate and Proposal form—what the installation contractor's charge should or will be, that figure will be calculated, and proper notations will be made, wherever necessary, within the proper spaces on the contractor's job documents. Should

the designated Sears' representative be unable to determine a proper contractor's charge, these documents will be forwarded within Complainant's job folder with no stated charge shown.

(While the contractor's total charge has generally been entered on the work orders given the linoleum and tile layers, through Sears' warehouse, the space for such notations has frequently been left blank on those issued Joe and Eddie by Sear's Westland store.)

The record, however, clearly warrants a determination that the total contractor's price noted by Sears does not bind the floor covering installers concerned. These "contractors" are the final judges with respect to their own final charges. Those who testified, herein, declared—consistently—that they have changed Sears' total price notation whenever it did not, for any reason, correctly reflect the work performed. Division Manager McNally of Sears' Westland store conceded that Joe and Eddie have done this many times, with or without explanations.

When a job is completed and the particular craftsman concerned desires to be paid, he sends Complainant herein—wherever he originally picked up his work documents—the proper copy of Sears' Estimate and Proposal form previously received (No. 4 copy), together with a Sears originated invoice form.

(These documents may be turned in whenever the installer finishes his job; they may, however, be retained and accumulated before submission, for a week, or as long as the installer desires.)

If Sears' Proposal form (No. 2 copy) did not contain a notation stating the contractor's charge, he will make the necessary entry, based on his previously negotiated price list. Whenever he has performed extra work, directly related to whatever specific installations may have been

directed, he may *add* charges for such work to the total sum which Sears' representative may previously have entered; whenever the total charge computed by the Sears' representative has been misfigured, the contractor may note a *correction*. Such changes are, generally, made without Sears' authorization, though the contractor may have given Complainant notice of his intention to make a change, where large sums are concerned. In all three situations, Sears regularly changes its records, and pays the installer whatever sum he claims is owed, for the job or jobs covered. So far as the record shows, no bill ever submitted for a job or jobs, with respect to which the prices were first computed or recomputed by the contractor, has ever been rejected.

When paying floor covering installers, Sears withholds no sums to cover Social Security or Federal Income taxes; nor is there any percentage withheld to cover possible installation mistakes.

C. *Conclusions.*

1. The Installers are Independent Contractors.

The legal standard pursuant to which a determination must be made as to whether the floor covering installers, herein, must be considered independent contractors or employees involves the so-called "right to control" test. Cf. *Local No. 2265, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpet Center, Inc.)*, 170 NLRB No. 93. The test has been declared relevant and proper, with judicial concurrence; it has been utilized many times. See, *e.g. Pure Seal Dairy Company*, 135 NLRB 76, 79. Within the case last cited, the Board formulated this legal standard as follows:

> In determining the status of persons alleged to be independent contractors, the Act requires the application of the "right to control" test. Where the person

> for whom the services are performed retains the right to control *the manner and means* by which the result is to be accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to *the result sought*, the relationship is that of independent contractor. The resolution of this question depends upon the facts of each case and no one factor is determinative. (Emphasis supplied.)

When the facts of the present case are reviewed, with reference to this legal standard, their clear preponderance shows—within my view—that Sears does *not* retain the right to control *the manner and means* by which floor coverings which it sells will be installed. Rather, control is reserved *merely* with respect to the *result* sought. The floor covering craftsmen concerned herein, therefore, must be considered independent contractors. The Board's previously noted *Carpet Center* decision—which confirmed a Trial Examiner's determination, finding carpet installation workers to be employees of the respondent company therein designated—specified some six facets of the particular company-installer relationship, therein found, which the Trial Examiner and Board considered determinative. No more than one of these listed, however, can be considered characteristic of the company-installer relationship which this record reveals.

> (The Trial Examiner's *Carpet Center* decision refers to the fact that respondent company therein, should it find the work of particular installers displeasing in any respect, may discipline or get rid of them by withholding future assignments. Sears, with its installation contracts, likewise maintains such a right. I would consider the designated right consistent with either an "independent contractor" or "employee" determination.)

Within the Trial Examiner's decision noted, some ten further characteristics which mark *Carpet Center's* relation-

ship with its carpet installation workers are mentioned. Practically none of these, however, can be considered descriptive of Sears' relationship with the floor covering contractors which are herein concerned.

(First, the Trial Examiner's *Carpet Center* decision, among other things, notes that the manager of respondent company therein, when he assigns work to particular installers, takes into account both the number of yards to be laid, and where the installers live, trying to give them work near their homes. Sears' job tenders, directed to particular carpet layers, likewise, take into account the total number of yards to be laid. The present record, however, shows that those job assignment limitations which Sears will recognize derive from directives which the concerned installers have themselves laid down, rather than from Complainant's departmental policies. Further, Sears' job tenders are proffered without regard for the particular contractor's geographical convenience. Secondly, while Sears' contractors—like *Carpet Center's* workmen—are themselves required to load materials they may need for various jobs, this record warrants no determination that they are normally permitted or required to search for such materials, personally, within Sears' warehouse or departmental storage facilities. Thirdly, contractors are presumably requested or required—like *Carpet Center's* workmen—to give Sears notice, whenever they will be unavailable for work because of vacations, sickness, or for some other reasons; nothing in the present record, however, warrants a determination that Sears maintains a definitive rule or regulation, regarding the time limits before which such prior notice must be given. There is some record suggestion that such notices may, somtimes, not be given.)

Within his decision, the Board's *Carpet Center* Trial Examiner found—with respect to that firm's installation craftsmen—that "certain aspects of their relationship with the company," would, despite his contrary conclusion, tend to support a possible independent contractor determination. My reading of the decision noted reveals some five "aspects" characteristic of the relationship therein considered which might, arguably, have suggested such a conclusion. The present record, *inter alia*, reveals these selfsame five "aspects" likewise operative herein, coupled with others, when we consider the nature and scope of Sears' relationship with its various Denver floor covering installation contractors.

Such considerations, within my view, clearly require a determination—contrary to Respondent Union's suggestion herein—that *Carpet Center* presents a situation factually distinguishable from that which the present record reveals, regarding the nature of the relationship which Respondent Union herein, through its challenged course of conduct, presumably sought to modify.

This Board has previously declared that its resolution of so-called "independent contractor" questions, through what has been designated the "right to control" test, will depend upon the facts of each case, with no single factor considered determinative. The trier of fact, therefore, finds no necessity, herein, presently to recapitulate, *seriatim*, those several factors marking Sears' relationship with various floor covering installation contractors which dictate its final characterization as one falling within the statutory "doing business" concept. Rather, I find it sufficient to declare, broadly that, their relationship—*when considered in totality as detailed within the present record*—merits a characterization consistent with General Counsel's contention herein.

(Previously, within this decision, passing references

have been made to certain partially contradictory testimony proffered by General Counsel's witnesses, regarding the precise format of their suggested price list for linoleum and tile installation work, when they presented that list to Sears' warehouse installation department manager for negotiation. The first witness, Massey, testified that Chandler had been presented with proposals regarding the compensation which *Harris and he* wished to *receive* for various types of work related to linoleum and tile laying. Thereafter, Harris testified—differently—that Chandler was given proposals regarding the sums which Sears' *customers* should be *charged* for various tasks connected with linoleum and tile installation work; this proposal, so Harris declared, was drafted because of their presumption that Sears would, finally, determine *their compensation* by applying a predetermined percentage figure to whatever sums Complainant's customers may have been *charged* for installation services. While testifying, Harris produced a purported copy of the document which Chandler had been given; that document supports his recollection, since it shows proposed "selling" prices for installation work done in connection with Sears' linoleum and tile sales. With matters in this posture, Harris' testimony regarding the proposal's format—which Chandler substantially corroborated—merits credence. Having reached this conclusion, however, I reject Respondent Union's presumptively consequent contention that such a proposal, dealing with Sears' *selling* prices, suggests a consensus—shared by Chandler on the one hand, and both hard surface contractors on the other—that their price list negotiations were really *employer-employee* discussions. I note, in this connection, that the proposed price list—despite its form—was initiated by these

installers; both were seeking higher compensation. Further, I note that Chandler's final response—with respect to which both Massey and Harris later concurred—was prepared to show Sears' linoleum and tile work *costs;* rather than Sears' proposed *customer charges*, it listed the specific sums which *Massey and Harris* would, thereafter, *receive*. And in any event, whether or not my conclusion is considered sound, these Chandler-Massey-Harris negotiations, within my view, possess no compelling or crucial significance. When considered in perspective, *within the context which the complete record provides*, such negotiations can hardly be considered, themselves, sufficiently substantial or significant to warrant a rejection of General Counsel's position.)

Counsel for Respondent *Union did, finally, produce a* document culled from Sears' file wherein Complainant's various contractors were, substantially, directed to procure some designated insurance coverage, some sort of Federal Account number, and to have their contract notarized. Chandler's decision to promulgate these directives, however cannot—with due regard for the whole record—be considered sufficient to dictate a conclusion that he was addressing employees, or to vitiate my determination that Sears' floor covering installers held "independent contractor" status.

These installers, then, must be considered independent businessmen. And since Sears' concern, with respect to their work, is limited merely to such work's final result, Complainant's business relationship with them cannot be considered sufficiently close to destroy its neutrality. Complainant's counsel, within his brief, suggests—in this connection—that:—

> It is important in analyzing this record to understand that the installation of floor covering is not an inte-

> grated part of our business and in arranging for the installation Sears has not delegated the function normally performed, nor ever performed, by regular Sears employees; the customer is expressly told that Sears will not do the installation . . . In our situation the fact that Sears will find an installer for the customer is merely an aid in selling the merchandise; Sears has not replaced an integrated employee operation with an outside contractor.

These factual contentions, within my view, have record support; I concur. Further, nothing within the record would warrant a determination that Sears claims any power or right to determine labor relations policy for or with these floor covering installation contractors. Necessarily, therefore, Respondent Union's grievance could only be resolved by them, not by Complainant herein; I so find. Under no circumstances can these floor covering firms be considered "allies" with respect to Sears, concerning a dispute which the latter firm could resolve. Nor can the reverse be considered true. Respondent Union's contrary contention must be rejected.

2. Respondent Union's Conduct Violates the Statute.

Once a determination has been made that the various carpet, linoleum and tile layers whom Sears utilized for floor covering installation work must be considered independent contractors, there can be no doubt that Respondent Union herein—determined to procure a settlement of differences with Joe and Eddie's Carpet Service particularly—relied upon statutorily proscribed means to pursue objectives statutorily forbidden. I so find. Regarding this portion of General Counsel's case, Complainant's counsel, within his brief, notes:

> . . . that the Respondent attempted to make [Joe Brase, Eddie Stimac and Charles Duran] become members;

> that they refused to join; that upon their refusal to join they were picketed; that, when the picketing failed to have any effect, the Respondent began and continued to picket Sears. The object of the picketing at Sears can be and is only to force Sears to stop doing business with the installers until they join the Union.

This trier of fact finds counsel's statement both factually correct, and legally persuasive. The Supreme Court has clearly held that peaceful picketing—comparable with Respondent Union's picketing with which this case is concerned—constitutes "inducement" and "encouragement" statutorily proscribed. *N. L. R. B.* v. *Electrical Workers*, 341 U. S. 694, 701-702. Such a conclusion with respect to this case may be—indeed must be—considered warranted even though Respondent Union's picket lines, on some occasions, may not have been successful. *N. L. R. B.* v. *Denver Building Trades Council*, 193 F. 2d 421 (C. A. 10). Respondent Union's pickets have, however, had a discernible effect. True, the record may show nothing reliable or probative regarding their success, or lack of success, when they picketed Joe and Eddie's Carpet Service, specifically—nor may it show persuasively what success, if any, Respondent Union had when it picketed Sears' Cherry Creek store. With respect to Sears' warehouse, however, Respondent Union's picket line clearly brought results. Deliveries were delayed, or were not made. Such a record showing warrants a determination that Respondent Union's picket line was—despite the mild language found on its picket signs—reasonably calculated to induce or encourage individuals, employed by persons or business enterprises engaged in commerce, to refuse, in the course of their employment to transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services. I so find. Further, Respondent Union's picket line—to the extent that it was successful—effectively threatened, coerced and restrained Sears directly.

Respondent Union's proscribed object, likewise, must be considered manifest. The Union's original purpose was shown when Joe and Eddie's Carpet Service was picketed, while the partners and their workman were performing work within a customer's home. When such picketing produced no tangible result, Respondent Union commenced its picketing of Complainant herein. As General Counsel notes—within his brief—the only conclusion which can properly be drawn when a labor organization pickets a commercial firm "doing business" with some independent contractor, with whom that labor organization has a dispute, must be the conclusion that at least "an" object of respondent labor organization's picket line is the forced cessation of that business relationship. I so find.

IV. The Effect of the Unfair Labor Practices Upon Commerce.

The activities of Respondent Union and its designated representatives, set forth in Section III above—since they occurred in connection with the business operations of Complainant herein previously noted—have had a close, intimate, and substantial relation to trade, traffic, and commerce among the several States. Absent correction they would tend to lead, and in this instance have led, to labor disputes burdening and obstructing commerce, and the free flow of commerce.

V. The Remedy.

Since it has been found that Respondent Union and its representatives did engage, and continue to engage, in certain unfair labor practices, it will be recommended that they cease and desist therefrom, and take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act, as amended.

Conclusions of Law

In the light of these findings of fact, and upon the entire record in this case, I make the following conclusions of law:

1. Sears, Roebuck and Co. is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

2. Joe Brase and Eddie Stimac, d b a Joe and Eddie's Carpet Service Company; Crown Carpet, Inc.; Paul E. Clark, d b a Clark Carpet Service; Frank Harris, d b a Frank Harris Tile Company; Daryl Massey, d b a Duke's Floor Covering; Joseph Mozzicato; John Erpelding, d b a Sea-Ro Tile Company; and Gerald Fallert, d b a G. & H. Tile Company, are persons engaged in commerce, or in an industry affecting commerce, within the meaning of Section 2(6) and (7) of the Act, as amended.

3. Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act, as amended.

4. By inducing and encouraging individuals employed by Sears, or by other persons engaged in commerce or in an industry affecting commerce, to refuse, in the course of their employment, to transport or otherwise handle or work on goods, materials, articles or other commodities, or to perform services—for the purpose of forcing or requiring Sears to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with, Joe and Eddie's Carpet Service, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato, Sea-Ro Tile Company, and G. & H. Tile Company—Respondent Union has committed an unfair labor practice within the meaning of Section 8(b)(4)(i)(B) of the Act, as amended.

5. By threats, coercion or restraint, directed both to Sears, Roebuck and Co. and other persons engaged in commerce or in an industry affecting commerce—for the purpose of forcing or requiring such persons to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer processor, or manufacturer, and to cease doing business with other persons—the Respondent Union has committed an unfair labor practice within the meaning of Section 8(b)(4)(ii)(B) of the Act, as amended.

6 The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

Recommended Order.

Upon these findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, order that respondent labor organization, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, together with its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducement or encouragement of any individual employed by Sears, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal, in the course of his employment, to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is to force or require Sears, Roebuck and Co., or any other person, to cease doing business with Joe and Eddie's Carpet Service Company, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato,

Sea-Roe Tile Company, G. & H. Tile Company, or any other person;

(b) Threatening, coercing or restraining Sears, Roebuck and Co., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Sears, or any other person, to cease doing business with the partnership and several sole proprietorships designated within the proceding subparagraph.

2. Take the following affirmative action which will effectuate the policies of the Act, as amended.

(a) Post in conspicuous places at its business offices and meeting halls, including all places where notices to members are customarily posted, copies of the notice attached to this report as an appendix.[1] Copies of this notice, to be furnished by the Regional Director for Region 27, as the Board's agent, shall be posted immediately upon their receipt, after being duly signed on behalf of respondent labor organization by its duly designated representative. Once posted, it shall remain posted for 60 consecutive days thereafter. Reasonable steps shall be taken by respondent labor organization to insure that this notice is not altered, defaced, or covered by any other material;

(b) Sign and mail sufficient copies of this said notice to the Regional Director for Region 27 for posting by Sears Roebuck and Co., this recipient being willing, at all locations where notices to employees and installation contractors are customarily posted;

1. In the event that this Recommended Order is adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

(c) File with the Regional Director of Region 27, as the Board's agent, within 20 days of the service of this decision, a written statement setting forth the manner and form in which it has complied with these recommendations.[2]

Dated: February 6, 1969.

s MAURICE M. MILLER,
Trial Examiner.

APPENDIX.

NOTICE.

To All Members of Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO.

PURSUANT TO

The Recommended Order of a Trial Examiner of the
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(As Amended)

we hereby notify you that:

WE WILL NOT induce or encourage anyone employed by Sears, Roebuck and Co., or by any other person engaged in commerce—or in an industry which affects commerce—to engage in a strike or refusal—in the course of his employment—to use, manufacture, process transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services—for the purpose of forcing or requiring Sears Roebuck and Co., or any other person,

2. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 27, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

to cease doing business with Joe and Eddie's Carpet Service Company, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato, Sea-Ro Tile Company, G. & H. Tile Company, or any other person.

WE WILL NOT threaten, coerce or restrain Sears, Roebuck and Co., or any other person engaged in commerce—or in an industry which affects commerce—by maintaining picket lines, or by any other means—for the purpose of forcing or requiring Sears, Roebuck and Co., or any other person, to cease doing business with the partnerships and sole proprietorships named in the paragraph above.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 260 New Custom House, 721—19th Street, Denver, Colorado, 80202, Telephone No. 297-3551.

UNITED STATES COURT OF APPEALS,

Tenth Circuit.

March, 1969, Term

Filed United States Court of Appeals, Tenth Circuit, May 15, 1969. William L. Whittaker, Clerk.

SEARS, ROEBUCK AND CO., CHARGING PARTY AND COMPLAINANT BEFORE THE NATIONAL LABOR RELATIONS BOARD,

Appellant,

vs.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

Respondent-Appellee,

CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee.

No. 6-69.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

Gerald C. Smetana, Chicago, Illinois (Donald L. Giacomini, Denver, Colorado, and Kalvin M. Grove, Chicago, Illinois, on the brief) for Appellant;

Philip Hornbein, Jr., Denver, Colorado, for Respondent-Appellee;

Julius G. Serot, Assistant General Counsel, Washington, D.C. (Arnold Ordman, General Counsel, Dominick L.

Manoli, Associate General Counsel, and Marvin Roth, Attorney, Washington, D. C., on the brief) for Petitioner-Appellee.

Before MURRAH, *Chief Judge*, and LEWIS and HILL, *United States Circuit Judges*.

HILL, *Circuit Judge*.

This is an appeal by Sears, Roebuck and Company, the charging party and complainant before the N. L. R. B., from an order of the district court dismissing the petition of the Regional Director for a preliminary injunction under section 10(l) of the National Labor Relations Act, as amended, 29 U. S. C. § 160(l). The Regional Director did not appeal from the denial of the injunction and asserts that consequently this court does not have jurisdiction to consider the merits of the matter because Sears lacks the necessary standing to prosecute this appeal.

Sears originally filed a charge with the Board alleging that the Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, was picketing Sears in furtherance of a dispute with Joe and Eddie's Carpet Service, a firm employed to install floor coverings sold by Sears. After investigating the charge, the Regional Director concluded that there was reasonable cause to believe that the Union was engaged in picketing in violation of section 8(b)(4)(i)(ii)(B) of the Act, and that a Board complaint based on that charge should be issued. Pursuant to the mandate of § 10(l), the Regional Director then filed a petition for an injunction with the district court pending final disposition of the complaint before the Board. As the charging party, Sears was notified, in accordance with the provisions of § 10(l), of the filing of the petition and the time and place of the hearing to be held by the district court. At that hearing the party

litigants, the Board and the Union, presented evidence to support their contrary positions on the unlawful picketing issue underlying the Board's quest for an injunction. Sears put in an official appearance but did not participate in any meaningful fashion. The court considered the various contentions of the parties and concluded that the Board had failed to sustain a case for injunctive relief. The Regional Director decided to accept the judgment of the court but Sears disagreed and instituted this appeal.

The Board takes the position that Sears was not a party to the § 10(l) court proceeding and cannot appeal therefrom. This is said to follow from the fact that § 10(l) merely provides that the charging party "shall be given an opportunity to appear by counsel and present any relevant testimony." It is argued that to expand that grant of limited participation into a full scale right to appeal when the Board declines to do so, would be not only to ignore the plain meaning of the statutory language, but would constitute a total disregard for the overall scheme of labor injunction treatment embodied in the N. L. R. A. and the Norris-LaGuardia Act.

Sears counters by stressing that § 10(l) is an exception to the general prohibition against labor injunctions, which to be fully understood requires that a distinction be made between "institution" of an injunction proceeding and "subsequent acts in support thereof." Sears claims that Norris-LaGuardia is concerned only with the institution of such petitions and that once the Board has filed the petition pursuant to § 10(l),[1] Norris-LaGuardia no longer operates as a barrier. Thus § 10(l) should be interpreted as granting charging parties all the rights of full juridicial parties, including the right to appeal. We cannot agree and

[1] Section 10(h) exempts section 10 proceedings from the operation of Norris-LaGuardia. Hence, when the Board invokes § 10(l) the district court has jurisdiction.

must conclude that Sears lacks the necessary standing to undertake this appeal.

It is not necessary to repeat the history of abuses that prompted the Norris-LaGuardia Act, nor to belabor the public policy formulated therein. The language of that Act clearly indicated that "Congress was intent upon taking the federal courts out of the labor injunction business . . ." *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365, 369 (1960). Accordingly, when an exception to that Act, such as is here involved, is relied upon to support the jurisdiction of the court, the language employed to articulate that exception will not be given any more expansive an interpretation than is clearly warranted.[2] Viewed in that context, the limited rights conferred upon a charging party in a § 10(l) proceeding, the right "to appear by counsel and present any relevant testimony," must be taken to mean just that, no more and no less. To read into that restricted right of participation, the right to initiate appeals, a right traditionally available only to full party litigants, would not only violate every sound principle of statutory construction, but would require a complete disregard for the sensitivity of the labor injunction problem.

Section 10(l), and its counterpart § 10(j), were designed to provide temporary injunctive relief pending the final adjudication of the Board. The temporary relief is allowed only upon the filing of a petition by the Regional Director. It is his view of the facts and law that the district court is to consider. "The courts are not free to roam at will over every aspect of a labor dispute upon the request of the charging party. * * * [T]he principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to

2. The Supreme Court has repeatedly cautioned against judicial dilution of Norris-LaGuardia, *e.g.*, *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962); *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91 (1940).

aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant." *McLeod* v. *Business Machine & Office Appl. Mech. Conf. Bd.*, 300 F. 2d 237, 243 (2d Cir. 1962). "When the Board declines to appeal an adverse district court decision, the charging party may not initiate an appeal, for then the charging party would become the principal complainant, in defiance of the scheme of the Act to the contrary."

The cases relied upon by Sears, namely, *Automobile Workers* v. *Scofield*, 382 U. S. 205 (1965) and *Retail Clerks Union* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (9th Cir. 1965), are distinguishable and of limited assistance here. In Scofield the Court held that both the successful charging party and the successful charged party have a right to intervene in the court of appeals proceeding reviewing a final Board order. Section 10(f) of the Act expressly provides for the right of an aggrieved party to obtain judicial review. The Court determined that "Congress would not intend, without clearly expressing a view to the contrary, that a party should suffer by his own success before an agency." 382 U. S. at 216. No plausible theory has been advanced to justify extending the reasoning of Scofield to the totally unrelated issue presented here. Sections 10(l) and 10(f) deal with completely different situations. The temporary injunctive relief provided by § 10(l) does not contain elements of multiplicity of appeals or stare decisis that concerned the Court in its consideration of the § 10(f) question.

In Retail Clerks the court reviewed the action of a district court that had granted a temporary injunction after the Board had attempted to withdraw a § 10(l) petition. In upholding the right to grant an injunction after considering evidence introduced by the charging party, the court observed that to do otherwise "would make the district court's action a mere rubber stamp for the Regional Direc-

tor." 351 F. 2d at 530. The precise holding of the case thus relates to the conduct of § 10(l) petitions in the district court and can have no direct bearing upon the right to appeal at issue here. Moreover, any implifications to the contrary that might be drawn from the decision, are completely dispelled by the fact that the court denied the request of the charging party to intervene at the appellate level. If the court had intended to accord charging parties equal status with full party litigants, there would have been no need to intervene and certainly no justification for requiring the parties to appear as amici curiae.

In sum, we conclude that to grant a charging party the right to appeal, a right ordinarily reserved to party litigants, would constitute an unwarranted expansion of the more limited rights conferred by the express language of § 10(l). Such an expansion, if there is to be one, must originate from other sources.

Sears urges in the alternative; that if the contention that it is already a party in the § 10(l) proceedings is rejected, then permission should be granted to allow it to intervene in order to prosecute this appeal. What has been said with regard to the right to appeal as a party, applies with equal force to the assertion of a right to appeal as an intervenor. Section 10(l) confers specific limited rights upon a charging party. The right to initiate an appeal is not one of them. What cannot be obtained directly by asserting a right to appeal as a party, cannot be obtained indirectly through intervention. Cf. *Reynolds* v. *Marlene Industries Corp.*, 250 F. Supp. 722 (S. D. N. Y. 1966).

Appeal Dismissed.

176 NLRB No. 120

D-2074
Denver, Colo.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

and

SEARS, ROEBUCK AND CO.

Case 27-CC-278.

DECISION AND ORDER.

On February 6, 1969, Trial Examiner Maurice M. Miller issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision with a supporting brief, the General Counsel filed an answering brief, and the Charging Party filed an answering brief and cross-exceptions with a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the excep-

tions, cross-exceptions, and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following clarification.[1]

We agree with the Trial Examiner's findings, based on the application of the "right to control" test to the particular facts of this case, that the floor covering installers involved herein, who perform services for Sears, Roebuck and Co., are independent contractors. Further, we agree that there is no basis for finding Sears to be an "ally" of the contractors in their dispute with the Respondent.

As more fully set forth by the Trial Examiner, all of the installations are accomplished by separate enterprises, which have other customers in the Denver area. These businesses are operated from the homes of their owners, who perform no work on the Sears' premises. They operate with their own business trucks, tools, materials, bank accounts and liability insurance, and they wear no Sears' uniforms of any kind. The installers are responsible to repair any of their work which is defective and to pay for any damage. The installation enterprises set their own daily work limitations and schedules and, on occasion, several have subcontracted Sears' jobs without prior approval or knowledge of Sears. Although the contracts between Sears and the installers call upon the contractor to refrain from doing extra work for Sears' customers without written authorization, the practice is clearly to the contrary. Unlike Sears' employees, the installers' relationship with the company is not governed by the personnel manual, nor do they have to take the physical examination required of all Sears' employees, and none of the con-

1. The Respondent's request for oral argument is hereby denied as, in our opinion, the record, including the exceptions, cross-exceptions and briefs, adequately presents the issues and the positions of the parties.

tractors or their employees receive any employee benefits from Sears, except an occasional 1-day discount which is also available to police and firemen, among others. Those installers who perform services with their own employees pay such assistants at rates fixed solely by them and deduct from their wages all necessary items such as social security and taxes. On the other hand, the contractors are paid by Sears without any such deductions.

Contrary to the Respondent's contention, the facts of this case are clearly distinguishable from those in *Carpet Center*.[2] Unlike the particular indicia of control retained by the retail carpet dealer in that case, the record here shows that the installers can and do schedule work for other customers on the days they work for Sears and they determine the order of performance. Furthermore, Joe and Eddie's Carpet Service, one of the installers herein, reschedules work by arrangement with Sears' customers without notifying Sears. None of the installers are supplied with precut or presewn material, or with instructions on how to get to a customer's premises. The contractors need not report to Sears daily or at any given time, and assignment of work is not based on where the installers live. Although the contractors are presumably required to give Sears notice whenever they will be unavailable for work because of vacations, sickness, or for some other reason, there is some record evidence that such notices are not given. The price lists which were arrived at through negotiations between Sears and the installers reflect the fact that the contractors are paid according to the difficulty of the work, instead of a single rate per square yard. The installers can and do change the prices set forth on work orders if for any reason they do not accurately reflect the

2. *Local No. 2265, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpet Center, Inc.)*, 170 NLRB No. 93.

actual work performed. Generally the installers are supplied with a room layout showing the areas to be covered and on occasion the seams to be sewn; however, they may and do disregard said layouts if they believe they can perform the job in a more satisfactory manner. Furthermore, if in their judgment a job cannot be completed satisfactorily the installers can and do reject the assignment.[3]

From the foregoing, it is apparent that the Sears' installers clearly have a far greater scope of decision-making power than those in *Carpet Center* and *Arnold's Carpet* and are independent contractors.

Having found that the installers are independent contractors and that Sears is not sufficiently related to the contractors to destroy its neutrality, we adopt the Trial Examiner's further findings that Respondent violated Section 8(b) (4) (i) (ii) (B) of the Act by picketing Sears, with an unlawful object of forcing Sears to cease doing business with the installers, including Joe and Eddie's Carpet Service, with whom the Respondent had a dispute.

3. The instant case is also distinguishable from the recent decision in *Carpet, Linoleum and Soft Tile Layers Local No. 1238 (Arnold's Carpet)*, 175 NLRB No. 50, in that here there is substantial record evidence that the installers can and do exercise independent judgment over the manner of cutting and piecing together the carpet. We also note that, whereas the installer in *Arnold's Carpet* received weekly payments, the Sears contractors may be paid by the job or whenever they desire.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., June 20, 1969.

FRANK W. McCULLOCH,
Chairman.

GERARD A. BROWN,
Member.

SAM ZAGORIA,
Member.

National Labor Relations Board.

(SEAL)

IN THE UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Case No. 23223.

PETITION TO REVIEW AND SET ASIDE A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, hereby petitions the Court to review and set aside a Decision and Order of the National Labor Relations Board in the case designated *Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO and Sears, Roebuck and Co.*, cited officially at 176 NLRB No. 120, and decided June 20, 1969.

Jurisdiction of this Court is invoked pursuant to Section 10(f) of the National Labor Relations Act as amended, Act of June 23, 1947 C. 120, 61 Stat. 136, 29 U. S. C. § 151, et seq.

Said Decision and Order of the Board was that Petitioner had committed certain unfair labor practices within the meaning of the said Act and therefore Petitioner is a "person aggrieved by a final order of the Board" within the

meaning of Section 10(f) of the National Labor Relations Act.

Respectfully submitted,

DAVID S. BARR,
WILLIAM S. PEER.

Of Counsel:
BARR & PEER,
1825 K Street, N. W.,
Washington, D. C. 20006.

PHILIP HORNBEIN, JR., Esq.,
2007 Security Life Building,
Denver, Colorado 80202.
Counsel for Petitioner.

[Certificate of service omitted in printing.]

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Petitioner*, vs. NATIONAL LABOR RELATIONS BOARD, *Respondent*	Case No. 23,223

MOTION OF SEARS, ROEBUCK AND CO. FOR LEAVE TO INTERVENE

Now comes Sears, Roebuck and Co., a New York corporation, and pursuant to Rule 15(d), Federal Rules of Appellate Procedure, requests leave to intervene in the above proceedings and in support thereof states as follows:

1. Sears, Roebuck and Co. was the charging party before the National Labor Relations Board in the case designated *Carpet, Linoleum and Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO and Sears, Roebuck and Co.*, 170 NLRB No. 115, and the instant case seeks review of the order of the National Labor Relations Board granting relief to the conduct of Petitioner complained of by Sears, Roebuck and Co.

2. The picketing of Petitioner which occurred prior to the issuance of the order by the National Labor Relations Board occurred at the premises of installations of Sears, Roebuck and Co. in Denver, Colorado.

3. Sears, Roebuck and Co. has a vital interest in the outcome of the instant case and its rights will be seriously affected by an adverse decision. *[illegible] Power Reactor Company*, 367 U.S. 396 (1961).

Wherefore, Sears, Roebuck and Co. prays that this Honorable Court grant it leave to intervene in this proceedings and argue for enforcement of the order of the National Labor Relations Board.

Respectfully submitted,

KALVIN M. GROVE,
Kalvin M. Grove

EDELSTEIN, RAUNHEIM AND FOX,
111 West Washington,
Chicago, Illinois 60602

July 11, 1969.

(Certificate of service omitted in printing.)

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Petitioner*, vs. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	No. 23,223.

CROSS APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

On July 3, 1969 pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Sec. 151, et seq.), Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, instituted the captioned proceeding by filing with this Court a petition to review and set aside an order issued against it by the National Labor Relations Board on June 20, 1969, in a case appearing on the records of the Board as Case No. 27-CC-278.

Pursuant to Section 10(f) of the Act and Section 15(b) of the Federal Rules of Appellate Procedure, the Board files this cross-application for enforcement of said order.

In support of this cross-application, the Board respectfully shows:

(1) This Court has jurisdiction of this cross-application for enforcement by virtue of Section 10(f) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on June 20, 1960, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Petitioner, its officers, agents and representatives. On the same date, the Board's Decision and Order was served upon the Petitioner by sending a copy thereof post paid, bearing Government frank, by registered mail, to the Petitioner.

(3) Pursuant to Section 10(f) of the National Labor Relations Act, as amended, and Rule 15 of the Federal Rules of Appellate Procedure, the Board is certifying and filing with this Court a list of the documents, pleadings, and materials comprising the entire record of the proceeding before the Board as well as the findings and order of the Board in Case No. 27-CA-2[illegible].

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this transcript, application and transcript to be served upon the Petitioner, and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and exhibits, and the proceedings set forth in the transcript and upon the Order made thereupon a judgment enforcing in whole said Order of the Board, and requiring the Petitioner, its officers, agents, and representatives to comply therewith.

Marcel Mallet-Prevost,
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.
this 15th day of August, 1960

[Certificate of service omitted in printing.]

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

September Term, 1968.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION No. 419, AFL-CIO, *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	No. 23,223

Before: Tamm and Robb, Circuit Judges, in Chambers.

ORDER.

Filed August 25, 1969. Nathan J. Paulson, *Clerk*.

On consideration of the motion of Sears, Roebuck and Co. for leave to intervene, it is

ORDERED by the Court that the aforesaid motion be granted and said movant is allowed to intervene in this case.

Per Curiam.

ORDER OF THE SUPREME COURT OF THE UNITED STATES.

"The motion of the American Retail Federation for leave to file a brief, as amicus curiae, is granted. The motion of the Terminal Freight Handling Company, et. al., for leave to file a brief, as amici curiae, is also granted. The petition for a writ of certiorari is granted and the case is placed on the summary calendar."

[Order Issued November 17, 1969.]

STATUTE INVOLVED

National Labor Relations Act

61 Stat. 136, 29 U. S. C. § 151, et seq.

Sec. 8(b)(4)(B); (29 U. S. C. § 158(b)(4)(B))

"It shall be an unfair labor practice for a labor organization or its agents

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of

such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

SEC. 10. (a) [As in Act] [29 U.S.C. § 160(a)].

(b) [As in Act] [29 U.S.C. § 160(b)].

(c) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which petitions may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order. Upon the filing of the petition the court shall cause notice thereof to be served upon such person, and thereupon the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evi

dence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of

the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation

the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such or

ganizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).".